

FEDERAL FACILITIES COMPLIANCE ACT OF 1991

HEARING
BEFORE THE
SUBCOMMITTEE ON
ENVIRONMENTAL PROTECTION
OF THE
COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
ONE HUNDRED SECOND CONGRESS
FIRST SESSION
ON
S. 596

A BILL TO PROVIDE THAT FEDERAL FACILITIES MEET FEDERAL AND
STATE ENVIRONMENTAL LAWS AND REQUIREMENTS AND TO
CLARIFY THAT SUCH FACILITIES MUST COMPLY WITH SUCH ENVI-
RONMENTAL LAWS AND REQUIREMENTS

APRIL 16, 1991

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FEDERAL FACILITIES COMPLIANCE ACT OF 1991

TUESDAY, APRIL 16, 1991

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m. in room 406, Dirksen Senate Office Building, Hon. Max Baucus [chairman of the subcommittee] presiding.

Present: Senators Baucus, Mitchell, Metzenbaum, and Jeffords.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. The committee will come to order.

Today the Subcommittee on Environmental Protection is conducting yet another hearing on whether the Federal Government should be subject to the same environmental laws as everyone else. Quite frankly, I thought this question had been settled a long time ago, far back in 1976 when Congress first enacted the Resource Conservation and Recovery Act. Section 6001 of that act states,

Each department, agency, instrumentality of the Executive, Legislative, and Judicial branches of the government shall be subject to and comply with all Federal, State, interstate, and local requirements, both substantive and procedural, respecting control and abatement of solid waste or hazardous waste disposal in the same manner and to the same extent as any person subject to such requirements.

Despite this language, the Executive Branch agencies have continued to insist that they are not subject to the same environmental laws as everyone else. The Administration has litigated and lobbied at every opportunity to avoid having to comply with the same environmental laws as everyone else.

In fact, the Department of Justice has succeeded in persuading three Federal courts of appeal that section 6001 of RCRA does not waive sovereign immunity for the imposition of fines and penalties to enforce the substantive and procedural provisions of solid and hazardous waste laws.

With all due respect to these courts, I think they plainly misinterpret the law. On the other hand, I agree with the U.S. District Court for Maine, a court on which the present majority leader, Senator Mitchell, once served. That court recently stated,

Any intelligent person reading the statute would think the message plain. Federal facilities will be treated the same as private institutions so far as enforcement of the solid waste and hazardous waste laws are concerned.

It is well settled that fines and penalties for violations of law are a necessary and effective method of enforcing the law. This is as true for environmental law as it is for any other type of law. The EPA, itself, testified before the committee last year that,

Penalties serve as a valuable deterrent to noncompliance to help focus facility managers' attention on the importance of compliance with environmental requirements.

It is no wonder, then, that GAO's recent study of Federal facility compliance with the Clean Water Act found that the Federal rate of noncompliance was twice that of private facilities.

The legislation that was reported unanimously by this committee last year that is the subject of this hearing will make it clear that the Federal Government must play by the same rules as everyone else. There should be no double standard.

Last year there was not enough time at the end of the session for the Senate to consider the Federal Facilities Bill that this committee reported in late October. I anticipate that this year we will report the legislation much sooner and that we will be able to see it enacted into law in this Congress.

I am encouraged by today's testimony that indicates the Administration may be willing to accept the fundamental principal underlying the fines and penalties provision of the bill. If so, I believe we can expeditiously enact the bill and move on with cleanup, itself.

I certainly am willing to work with the Administration and affected agencies to work out any specific problems with the implementation of specific statutes; therefore, I do not believe that we should wait on this legislation until all these and other issues are resolved.

The committee will soon be holding hearings on RCRA and the Clean Water Act. These hearings will provide the committee, the Administration, and other persons with a good forum to address any concerns with the implementation of those statutes.

In closing, I would like to commend the majority leader, Senator Mitchell, for his leadership, for his patience, and his resistance on this issue. I pledge my support to the enactment of this legislation. I think I can speak for the vast majority of the members of this committee and the Congress who also likewise work for enactment of legislation.

I see the majority leader is present. It is my honor now to turn to him for any statement he may wish to make.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Senator MITCHELL. Mr. Chairman, thank you for your comments and thank you for holding this hearing today which focuses on S. 596, the Federal Facilities Compliance Act of 1991. I and 26 other Senators introduced this legislation last month to assure that federally-owned facilities would be treated the same as all others and be subject to enforcement actions for failures to comply with our hazardous waste laws.

Agency officials are fond of saying that there is no question the Federal Government must comply with the law; however, they oppose efforts by the States or EPA to actually enforce the law.

In February of this year the Office of Technology Assessment released a report on the environmental impact of nuclear weapons production. The report stated,

It is evident that the vast network of weapons facilities located on thousands of square miles of Federal reservations in 13 States has produced widespread contamination of the environment with toxic chemicals and radionuclides. Serious questions have been raised about the potential human health threats posed by such contamination.

The Department of Defense has 94 sites on the superfund national priorities list and 17,482 contaminated sites at 1,855 installations located in every State in the Union. I believe these problems are due in part to the lack of accountability engendered by confusion over sovereign immunity.

Draft compliance data show that compliance under the Clean Water Act and the Clean Air Act where sovereign immunity is not an issue is substantially better than compliance with RCRA. This is human nature. How many people would voluntarily pay income taxes without the threat of IRS enforcement? How many people exceed the highway speed limit when they feel confident they will not be seen or caught?

We need to clarify that there is one rule of law: that Federal agencies are treated like every other citizen. We cannot wait any longer for so-called "voluntary compliance" to work.

In the very limited time I have had to view the agencies' written testimony for this hearing—and that testimony was not available until late last night—I must say that I am confused by what the position of the Administration is.

EPA testimony supports the premise of this legislation.

DOD seems to agree with the goal of the bill but has other RCRA issues unrelated to sovereign immunity that it wants resolved before officially changing its position. That, in itself, is a change from an earlier DOD position draft that has been published. In the earlier DOD position paper it was prepared to support a waiver of sovereign immunity.

DOE's written testimony begins by insisting that the problems raised last year by the Administration be resolved, yet few of those issues are even discussed in the testimony today. Instead we have a panoply of new issues ranging from mixed waste to conditional remedies, a term unknown until last year and one that may be complex. Whether or not such changes will be made can only appropriately be decided in the context of full RCRA reauthorization.

The legislation now before this committee simply seeks to ensure enforcement of existing law. The confusion that has resulted and that is evident from the testimony of various agencies today makes it difficult for members of this committee to try to resolve these issues and makes meaningful dialogue with the Administration a more remote possibility. That is not what I had hoped would be the outcome of today's hearing, and I still hope that perhaps it will not be.

I want to make clear now that it is my intention to press for swift action on this legislation in this committee and by the full Senate as soon as possible to assure that public health and the environment are adequately protected. I believe in the final analysis there are going to be very few Senators who are going to be pre-

pared to vote against a bill that is as simple as saying that the Federal Government should obey the law which it imposes on others.

Senator BAUCUS. The first panel consists of: Mr. Larry EchoHawk, the Attorney General of the State of Idaho, representing the National Association of Attorneys General; and Mr. Terry Husseman, Assistant Director for Waste Management, Washington Department of Ecology, representing the National Governors Association.

Gentlemen, welcome. We look forward to hearing from you.

Under the rules of this committee, witnesses are limited to five minutes. Your full written statements will be placed in the record. The lights here signify your time limit. When it reaches orange, start wrapping up. When it reaches red, you have to stop.

We look forward to your testimony.

Before you begin, I'd like to ask that there be placed in the record a statement by Senator Jeffords with respect to this legislation.

[Senator Jeffords' statement follows:]

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Mr. Chairman, I will be very brief. I am in a unique situation with respect to this issue. I believe I represent one of the few States without any significant Federal facilities, at least within the context of this legislation. Thus, this bill would not benefit Vermont's State government in any way. Indeed, my concern is that this legislation could, if taken to extremes, actually drain money away from my State. I am comfortable that language can be added to this bill to ensure that this legislation does not become another means to transfer funds from little States to big States.

While I've heard some movement towards resolving the issues raised by the bill may be occurring, I believe greater efforts need to be made. I hope our witnesses today will tell us something positive about how States can enforce environmental laws on facilities in their States. If we were talking about industrial facilities, there would be little debate. We fully expect industry to comply with the laws, and in fact, we seem to have little hesitation adding new requirements.

Furthermore, government agencies fully expect the contractors operating their facilities to comply with applicable laws. There is no sovereign immunity for those who actually operate our government facilities. As many contractors will tell you, off the record, government agencies often hinder their efforts to comply with the law. If for no other reason, I believe the goals of this bill should be supported to protect the contractors that keep our facilities operating.

There are some issues that I would like to see resolved. For example, with respect to a military reservation, who pays the fine: the base commander or the responsible tenant? What procedures are in place to reimburse EPA for the cost of the inspections; the subject of an amendment I offered last year. I hope these are issues the various Department's will address.

Let me close by saying that I support Senator Mitchell's goal in trying to bring our federal facilities into full compliance. Given the many outstanding accomplishments of both the Department of Defense and the Department of Energy, I believe both Departments can achieve full compliance. Thus, I hope both Departments will work with us toward reaching this objective.

Thank you Mr. Chairman.

Senator BAUCUS. We'll begin with Mr. EchoHawk.

STATEMENT OF LARRY ECHOHAWK, ATTORNEY GENERAL, STATE OF IDAHO, REPRESENTING THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. ECHOHAWK. Thank you, Senator.

It is my pleasure to appear here as the Attorney General for the State of Idaho and on behalf of the National Association of Attor-

neys General in support of the Federal Facilities Compliance Act of 1991. It is also my honor and privilege to submit a letter signed by Governor Cecil D. Andrus of the State of Idaho on behalf of the National Governors Association. (See p. 9.)

S. 596 is a simple, straightforward piece of legislation. S. 596 is not a radical departure from existing law, but rather is an attempt to reconfirm Congress' original intent that the waiver of Federal sovereign immunity contained in RCRA be the same as the waiver of sovereign immunity contained in other Federal environmental laws such as the Clean Air Act, Clean Water Act, and the Safe Drinking Water Act.

This bill simply provides that Federal agencies are fully subject to State administrative and civil enforcement actions for violations of Federal and State solid and hazardous waste laws at Federal facilities, including civil and administrative penalties.

Because of the Administration's assertion that the unitary executive theory precludes EPA from imposing fines and penalties and because some misguided courts have construed section 6001 of RCRA as not waiving the United States' sovereign immunity to State enforcement actions for fines and penalties, there is presently no effective means for forcing Federal agencies to comply with Federal and State solid and hazardous waste laws.

While Federal agencies continue to assert that they are voluntarily complying with Federal and State waste laws, the facts belie that assertion. Daily we are confronted with new disclosures about the scope and extent of solid and hazardous waste problems at Federal facilities. This committee has previously heard the litany of problems; yet, even with the extensive examination these facilities have undergone, we have only begun to see the tip of the iceberg of the waste management problems at these facilities, thus the need for a strong EPA and State role in overseeing environmental compliance at Federal facilities is apparent.

The issue of Federal compliance is of vital importance to the State of Idaho. We in Idaho are only beginning to wrestle with the thorny issues related to Federal agency compliance with environmental laws at Federal facilities. Idaho is home to DOE's Idaho National Engineering Laboratory. INEL was established in 1949 as an area for testing of nuclear reactors, field processing plants, and support facilities related to national defense programs and other nuclear research activities. These activities generate significant quantities of radioactive, hazardous, and mixed waste. As early as 1973 the Federal Government began promising the people of Idaho that it would address these threats to the environment, particularly in the Snake River Aquifer Plain, caused by past and present solid and hazardous waste management practices at INEL.

The promised compliance and remedial measures, however, have been repeatedly postponed over the past 18 years, while the amount and nature of waste generated and stored at INEL continues to increase. As a consequence of DOE's unkept promises, the confidence of the people of Idaho in DOE activities at INEL is severely eroded.

Passage of S. 596 would give Idaho the ability to enter into enforceable consent orders with DOE to address pressing solid and hazardous waste issues at INEL. Without this legislation, Idaho

will remain in the hamstrung position of merely hoping that DOE follows through with its promises. This result is neither fair nor equitable, thus I urge you to pass S. 596 so that Idaho and other States will have the ability to require this and similar promises of the Federal Government to be kept.

Senator MITCHELL. Thank you very much, Mr. EchoHawk. You actually finished ahead of time, which sets a commendable standard for those who follow you.

Mr. Husseman.

STATEMENT OF TERRY HUSSEMAN, ASSISTANT DIRECTOR FOR WASTE MANAGEMENT, WASHINGTON DEPARTMENT OF ECOLOGY, REPRESENTING THE NATIONAL GOVERNORS ASSOCIATION

Mr. HUSSEMAN. Thank you, Senator Mitchell.

For the record, I am Terry Husseman, Assistant Director for Waste Management, the Department of Ecology, in the State of Washington. Governor Gardner asked that I convey his regret that he couldn't be here personally today. The Legislature is in the final stages of wrapping up and he could not leave the State. He wanted me to assure you that swift passage of the legislation you are considering here today is a high priority for him personally and for the National Governors Association.

I would ask permission, in addition to the written testimony, that the report on Environmental Compliance at Federal Facilities approved last year by the Governors Association be included as part of the record of this hearing.

Senator MITCHELL. It will be received for the file of this hearing.

Mr. HUSSEMAN. Thank you.

Mr. HUSSEMAN. The Governors strongly urge swift adoption of Senate bill 596. It is essential that Congress act quickly to clarify the waiver of sovereign immunity with respect to administrative orders and the imposition of fines and penalties against Federal facilities that violate State or Federal law. It is also important to empower the Environmental Protection Agency to collect fines and penalties against Federal facilities.

As previously indicated, we in the State of Washington were one of the States that believed that Congress had already clearly stated this position. Unfortunately, ours was one of the cases that the court determined the other way.

We do urge strong support and we're glad to hear that the bill is to be moved quickly.

The recommendations of the Governors are based on several factors:

First, the Governors believe in the importance of strong environmental laws administered and enforced by a strong and independent agency. Experience with virtually every environmental program teaches that the vigilance of an independent regulator is an indispensable ingredient for effective environmental protection. It provides credibility to the whole process—to the regulated, as well as to the process.

Second, the Governors believe that those who don't comply with the law must face strong and swift enforcement action. Polluters must know that they can and will be punished if they disregard the

law. If violators cannot be penalized for misconduct, they have essentially a free period of noncompliance until an injunction can be enforced to end the violation. The judicial process moves slowly and slows down progress in getting the environmental work done that all of us are trying to accomplish.

Finally, the Governors are very disappointed and dissatisfied with the record of environmental compliance at Federal facilities. Because this dismal record has now been well documented, I won't go over any details. We do recognize and appreciate the new attitude prevailing in at least some of the Federal agencies. Secretary Cheney and Admiral Watkins are to be commended for bringing a new attitude to their departments. None of that, however, change the fundamental fact that Federal facilities have in the past been among the very worst violators of environmental laws and they are now recognizing that they need to get in compliance and they need to be urged to move even more quickly.

Both departments' recognition that they need to move has stopped short of recognizing that enforceability is critical to the development of clean-up and compliance programs. It is the belief of the governors that this stance by the United States is a residue of the Federal Government's past attitude towards waste management. This stance is counter-productive to recent Energy and Defense initiatives and to the success of our joint efforts to quickly and efficiently clean up Federal facilities.

We wholeheartedly endorse the recommendations of the NGA and the National Association of Attorneys General that Congress should clearly waive sovereign immunity from the application and enforcement of Federal and State environmental laws and that Congress should enact legislation to improve EPA's ability to regulate other Federal agencies. This call has been supported by the NGA.

In summary, there is broad recognition that Federal facilities present some of the most challenging waste management problems in the United States and that they are far behind the private sector in implementing effective hazardous waste compliance and cleanup agreements. Substantial progress toward the implementation of clean-up programs has resulted from the recognition that the Department of Energy and the Department of Defense are subject to the same environmental laws as the private sector. A recognition of the need to leave attitudes of the past behind and to build commitments on the basis of full regulatory and public participation is the cornerstone of further progress and successful cleanup.

Once again we commend Secretary Cheney and Admiral Watkins for the progress they have made, but in order to rebuild public confidence in the credibility of the Federal operations we believe that it is critical that this bill be moved quickly and that it be passed and made law.

Thank you very much.

Senator MITCHELL. Thank you, Mr. Husseman.

I am advised that Senator Chafee and Senator Durenberger hope to be here, but a conflict with the Finance Committee and a joint meeting of the Congress may make it impossible for them to attend.

Let me ask both of you: have either of you had an opportunity to review any of the testimony by the Federal agencies that will be delivered shortly after you leave the witness stand this morning?

Mr. HUSSEMAN. I have had an opportunity to read the Department of Defense testimony and just before the hearing I got a copy of the Department of Energy's. I have only quickly scanned it.

My initial reaction is I saw nothing in their testimony that raised any specific issues or objections to the contents of S. 596, which I would say is a step forward. But the approach seems to be that there are some additional issues that they feel must be addressed.

Our position would be we are more than willing to sit down with all of the interested parties and address those issues, but we think there should be no linkage between resolution of those issues and movement of S. 596.

Senator MITCHELL. Mr. EchoHawk.

Mr. ECHOHAWK. Senator, I, too, have had an opportunity just very recently to review the comments of the Federal agencies. I concur in Mr. Husseman's comments that I think that we have to keep focused on S. 596. I think it stands alone on its merits in terms of bringing Federal facilities into compliance. We are interested in working on the issues that have been raised, many of which are very new, but we don't think that they have a connection with S. 596 that should delay the progress of this legislation.

Senator MITCHELL. Well, I thank you both very much for your testimony. Both the attorneys general and the governors have been supportive—for what I think are obvious reasons—of this legislation in the past, and I want to assure you that we are going to push this promptly and vigorously this year.

I think the concerns expressed by the agencies—and they'll be coming up momentarily—with respect to other aspects of RCRA may be appropriate and legitimate and ought to be addressed in that context and we ought to have a completely open mind in that regard, but I share the view you expressed that it doesn't make any sense to hold this bill up until something is resolved on some other bill.

We're going to do the best we can. We thank you for your effort and look forward to working with you.

Thank you very much, gentlemen.

I'd like to ask that there be placed in the record, at the appropriate point, a letter from Governor Andrus on behalf of the National Governors Association.

[The letter from Governor Andrus follows:]

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April 15, 1991

The Honorable George J. Mitchell
Majority Leader
U.S. Senate
176 Senate Russell Office Building
Washington, D.C. 20610-1902

Re: S. 596 (Federal Facilities Compliance Act)

Dear Senator Mitchell:

On behalf of the National Governors' Association, I am writing in support of your Federal Facilities Compliance legislation, S. 596. I appreciate the opportunity to share my thoughts on this bill, which is sorely needed to give the states and the Environmental Protection Agency (EPA) sufficient enforcement powers to ensure that federal facilities comply with one of our most important environmental laws, the Resource Conservation and Recovery Act (RCRA).

Last year, the National Governors' Association and the National Association of Attorneys General issued a report concerning the environmental management of federal facilities. The report, entitled "From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities," was the culmination of more than six months' work by a joint task force that I co-chaired with Washington state's Attorney General Ken Eikenberry. Our work was necessitated by what we perceived to be a consistent pattern of environmental problems at federally owned and operated facilities.

The environmental degradation that has resulted from the operation of these facilities has caused great concern among the American people. Although federal agencies are technically required to comply with both state and federal environmental laws, investigations have shown that federal agencies' compliance has been dismal and that they are often among the worst violators. This situation has resulted because neither EPA nor the states have had sufficient enforcement powers against federal agencies.

The states have a fundamental duty and indeed a sovereign right to protect their air, land, and water from the devastation that can occur as a result of improper disposal of wastes and environmental mismanagement. It was to define these rights and duties and to recommend changes in federal law and policy necessary to support them that the joint Governors-Attorneys General task force was established. Central to the recommendations contained in the report is a commitment to complete

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environmental compliance by federal agencies and environmental restoration of all federal facilities within a period not longer than thirty years. To obtain these goals, we recommend that Congress take specific actions to improve environmental compliance at federal facilities and by clarifying the waiver of sovereign immunity that federal agencies have enjoyed from the application and enforcement of RCRA.

Currently, EPA has a very limited ability to require federal facilities to correct environmental problems as a result of the Department of Justice's refusal to sue other federal agencies on EPA's behalf (the so-called "unitary theory of the executive"). Thus, voluntary compliance agreements have been the primary enforcement tool available to EPA for most situations involving environmental degradation caused by federal facilities.

Your legislation is needed to explicitly provide EPA with RCRA enforcement authority against other federal agencies. This legislation should permit EPA to issue unilateral administrative orders so long as the other agencies first have "the opportunity to confer" with the EPA. Moreover, the bill should provide that EPA would have the enforcement tools of sanctions and monetary penalties that could be imposed for noncompliance with RCRA.

Your legislation is also necessary to clarify issues surrounding the degree to which sovereign immunity has been waived by the federal government and to ensure that the states also have the ability to enforce the requirements of RCRA against federal agencies. We believe the legislation clarifies Congress' original intent that federal sovereign immunity is waived under RCRA. Unfortunately, judicial decisions have eroded this waiver to the point that federal agencies are no longer subject to meaningful compliance actions under RCRA. Your legislation restores the necessary authority of EPA and the states to enforce RCRA against federal agencies and subjects such agencies to fines and penalties for their failure to comply. As you know, states currently have these powers under the Clean Air and Clean Water Acts, and they have acted responsibly in enforcing those laws against federal agencies.

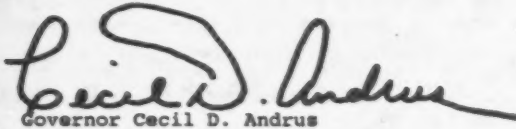
Finally, there is a basic question of fairness involved in this issue. Your legislation is needed to ensure that federal agencies stand on the same footing as private industry and the states when it comes to compliance with RCRA. Private industries and state and local governments have always been subject to enforcement actions and fines and penalties. The preferential treatment that the federal government now enjoys should be corrected to put federal agencies on a level playing field with everyone else. Our nation was built on principles of fairness and

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equality -- no one is above the law. The Federal Facilities Compliance Act not only applies this principle, but it also promotes the environmental integrity of the federal government.

With best regards,

Sincerely,


 Governor Cecil D. Andrus

Senator MITCHELL. Thank you, gentlemen.

We'll next hear from Mr. Chris Holmes, Deputy Assistant Administrator for Federal Facilities Enforcement of the EPA; Mr. Mark Schroeder, Deputy General Counsel for Energy Resources and Legislation, Department of Energy; and Mr. Thomas Baca, Deputy Assistant Secretary of Defense for the Environment, Department of Defense.

Gentlemen, thank you very much for coming. We appreciate your willingness to provide us with your views. We'll begin in the way they are listed with Mr. Holmes.

STATEMENT OF CHRIS HOLMES, DEPUTY ASSISTANT ADMINISTRATOR FOR FEDERAL FACILITIES ENFORCEMENT, OFFICE OF ENFORCEMENT, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY GORDON DAVIDSON, DIRECTOR OF THE OFFICE OF FEDERAL FACILITIES ENFORCEMENT AND LISA FRIEDMAN, ASSISTANT GENERAL COUNSEL

Mr. HOLMES. Thank you, Mr. Chairman.

I am accompanied today by Mr. Gordon Davidson, who is the Director of the Office of Federal Facilities Enforcement; and Lisa Friedman, who is the Assistant General Counsel, who handles all the RCRA and superfund matters. They are sitting right behind me, and, with your permission, I might have to turn to them during some of the questions.

Senator MITCHELL. Fine.

Mr. HOLMES. Thank you.

Senator MITCHELL. I hope I'm able to come up with a question penetrating enough to require you to get their assistance, Mr. Holmes.

Mr. HOLMES. For some reason I've been wondering about that all night long. I think you can.

You have my statement. I apologize for it getting in late last night. I am also grateful for the staff's patience to take it in so late.

I have some very brief summary comments which I'd like to make and then move on to my colleagues.

As I state in our statement, we support the objectives of the bill, which is to treat United States Government facilities under RCRA as a person, which is the same way in which we treat United States Government facilities under the Clean Air Act, Clean Water Act, and the Medical Waste Tracking Act. The net effect of treating U.S. Government facilities under RCRA as a person is a waiver of sovereign immunity.

We identify a number of issues in my testimony, as we do in the DOD and DOE testimonies that we hope can be addressed as soon as possible in order to garner full Administration support for the bill.

I want you to know up front that I am personally very, very committed to addressing these issues because I personally feel the fines and penalties are a very important and very effective tool, and I believe the States should have these panoply of resources.

I want you to know that we are not standing still in this whole are of enforcement and compliance at Federal facilities. I know

this matter is of deep importance to you. We've been working very aggressively over the last year to make sure that the compliance rates at Federal facilities is improved, to make sure that we protect the public, and to make sure that Federal agencies are accountable.

One of the principal mechanisms we have is on the superfund site. We have the binding and enforceable superfund cleanup agreements. As was noted, there are some 116 Federal facilities on the superfund list. We will have all of those facilities into these binding and enforceable agreements.

On the RCRA side, we are also placing Federal facilities into RCRA waste management compliance agreements, which have a net effect of instructing the facilities on how to come into compliance. These agreements are quite prescriptive.

Finally, I would just like to note that I think that everybody here agrees with Mr. Husseman—there is a new attitude. Clearly we have our marching orders from Secretary Cheney, from Secretary Watkins, and from Administrator Reilly that we are to set a national standard, and that's what we are trying to do.

In conclusion, I don't believe that the issues that we are representing to the committee are unable to be resolved. I think they can be resolved. I want to resolve them. I want to make sure we have the most effective enforcement mechanism in the country, and we can't do that until we have the States totally on board with us.

Thank you.

Senator MITCHELL. Thank you very much, Mr. Holmes.

Mr. Schroeder, welcome. We look forward to hearing from you.

**STATEMENT OF MARK SCHROEDER, DEPUTY GENERAL COUNSEL
FOR ENERGY RESOURCES AND LEGISLATION, DEPARTMENT
OF ENERGY**

Mr. SCHROEDER. Thank you.

Mr. Chairman and members of the committee, I am here on behalf of the Department of Energy to express our support for the objective expressed in S. 596, which is full compliance with the environmental laws, State and Federal.

I want to point out the efforts that the Department has made in recent years in this area. For example, our fiscal year 1992 budget represented a 30 percent increase over our fiscal year 1991 request—for fiscal year 1992 we requested \$4.2 billion for environmental restoration and waste management activities. Of that sum, in fiscal year 1991 and in fiscal year 1992 each we have budgeted over \$1 billion for compliance activities, alone.

We do have concerns with S. 596. We expressed those concerns last year when a similar bill was introduced as S. 1140. We believe the bill fails to recognize unique regulatory problems and exposes the Federal Treasury to potentially large liabilities with no expected benefit or impetus provided for either Federal compliance or cleanup.

Just a brief note of history and background. It was not until 1987 that the Department finally reconciled the exemption for Atomic Energy Act activities in section 1006(a) of RCRA with our other

RCRA obligations. Adoption of the so-called "by-product rule," pursuant to which we seek to comply with both statutes within their respective spheres of influence, however, does not solve our problems.

Many of RCRA's requirements, even if not "inconsistent" with the Atomic Energy Act, remain incompatible. For example, waste characterization and inspection requirements can lead to increased occupational exposures which are undesirable.

Another example is the land disposal restrictions in RCRA which prohibit disposal of certain materials without treatment and prohibit storage in excess of a year except for the purpose of accumulating quantities for treatment. The problem with this particular provision, specifically section 3004(j) of RCRA, is that for many of these materials there is simply no treatment technology; therefore, we are and will remain in noncompliance with the strict, literal requirements of the statute until we are able to develop technologies through research and development that will allow us to treat mixed radioactive waste materials.

There is available commercial technologies for purely hazardous waste streams. There are none available for these mixed radioactive waste streams.

There are available under the regulations some limited ability to gain variances or extensions, but none of these will provide us enough time to solve these problems. Absent statutory change in this area, we know that we will continue to be in violation and, under your bill, subject to fines and penalties.

I want to focus on the land disposal restrictions because many draw comparisons or analogies to the Clean Air Act or Clean Water Act. They point to the requirement that Federal facilities comply with these statutes and the waiver of sovereign immunity thereunder. However, under the Clean Air Act and Clean Water Act, the standards for emissions must be demonstrated technology. Under the land disposal restrictions of RCRA, we have a specific area where technology is not available and, in fact, technology availability is not required to be considered in RCRA.

I also want to point out for the members of the committee that today I am focusing on and urging your consideration of the mixed waste problem. We are not arguing that the Department should not, cannot, or will not comply with the requirements for the purely hazardous waste materials. We can, should, and do comply and continue to work to bring into compliance those facilities that aren't in compliance with these purely hazardous waste requirements.

I'd also like to point out for the benefit of the public that in some ways we do better than the private sector. Many of our facilities, because of the radioactive and radiological constituents and hazards, are continuously monitored, not just periodically. Federal facilities are subject to annual EPA inspections, not biennial inspections like private facilities.

I'd also like to talk about a couple of the facilities which recent press accounts indicate are the impetus for expedited action on your bill. Two of the facilities that were recently reported as being recalcitrant on the issue of fines and penalties and compliance were the Rocky Flats facility and the Hanford facility.

At Rocky Flats the specific agreement we are negotiating with the State and EPA concerns the mixed waste land ban problem. To subject the Federal Government to fines and penalties for not bringing those land ban mixed wastes into compliance when we know there is currently no technology, and years of research are required to develop that technology, is to require the Treasury to maintain an open checkbook or an open wallet.

At the Hanford facility the incident of perceived recalcitrance cited was our effort to reschedule the construction of the vitrification plant. At the Hanford facility we have what is known as a tri-party agreement. In the past year, our Office of Environmental Restoration and Waste Management reports that we met 77 of the 79 milestones in that agreement. One of the two milestones missed was the funding and construction of the vitrification plant for which we have sought an extension. The basis for the extension request is that we want to establish and prove the technology through the vitrification plant currently constructed in Savannah River. Here we have what the Department believes was a technically and fiscally prudent decision which, if you believe the press account, is rumored to be the basis for the push behind fines and penalties in this bill.

At many of these facilities the material is under controlled conditions and represents no health threat.

Other provisions of RCRA recognize industry-specific problems and we are only seeking the same.

I have prepared a lengthier prepared statement which I would like included in the record.

Let me conclude by saying we believe these fundamental problems need to be addressed in this bill before exposing the Federal Treasury to fines and penalties. We also look forward to working with you on other issues during RCRA reauthorization. Other provisions of the bill are discussed in my prepared statement.

Thank you.

Senator MITCHELL. Thank you, Mr. Schroeder.

I appreciate your statement that the Department of Energy supports the objectives of the bill. May I ask you more precisely: does the Department of Energy support waiver of sovereign immunity under the RCRA legislation?

Mr. SCHROEDER. We support the waiver of sovereign immunity if we can get some of the specific technical items addressed. The Administration does not support S. 596 absent some of these specific technical issues being taken into consideration.

Senator MITCHELL. Well, of course, anyone can put any condition they want on it, so would it be fair for me to conclude that your answer is that the Administration does not support waiver of sovereign immunity?

Mr. SCHROEDER. Absent those changes that's correct.

Senator MITCHELL. All right.

Mr. Baca, I'm going to have to go in a couple of minutes to participate in a joint session. I'd like to ask you that question at the outset. Does the Department of Defense support waiver of sovereign immunity under the RCRA legislation?

Mr. BACA. Mr. Chairman, we would go on record as saying yes, but we also qualify it as the Department of Energy has. We believe

the issue is bigger than fines and penalties. We believe the whole environmental system needs to be adjusted. If the system is adjusted—and I believe your bill will do some of that—if we have a commitment by this committee to work on RCRA and other legislation, sure we could live with it.

Senator MITCHELL. Well, a commitment to work on the legislation, a commitment to consider with openness and reasonable fairness the issues raised is one thing; a commitment in advance to agree with the positions that the Departments take on all of these other issues is obviously not possible. I took Mr. Schroeder's position to be "if you get your way on all this other stuff, you'll agree to this." Am I fair in concluding that?

Mr. SCHROEDER. Yes.

Senator MITCHELL. I must say to you I think that's a very unreasonable position, one which is not likely to be persuasive with Members of Congress. I respect your right obviously to hold that position in behalf of the Department. It is not an uncommon approach in legislative matters, I must say. We see this all the time. But I think what we have heard here today is that the Department of Energy doesn't favor waiver of sovereign immunity. I think that's particularly ironic since most of the problems in the country have been created under the authority of the Department of Energy.

Mr. Baca, is that your position, too? You've got to have your way on all these other things or you want some consideration of them, you want to be assured that they'll be evaluated and considered and you'll have input in the process, of course?

Mr. BACA. Mr. Chairman, if you'll step forth, as we will, to work out some of these issues that we believe are very sticky, I think we can together arrive at a common agreed-to solution. There are solutions, and I think after you understand the dilemma that we are in I think you'll understand the need to make some of these changes.

Senator MITCHELL. Mr. Holmes, you said you support waiver of sovereign immunity under RCRA.

Mr. HOLMES. I'm in really the same position that my colleagues are, that unless some of the concerns that we raise in the testimony are addressed we are reluctantly—I might add reluctantly—forced to oppose the bill.

Senator MITCHELL. Well, here's what you said in your statement. This is a quote from your statement:

We agree with the central intent of S. 596 that Federal facilities should be treated the same under RCRA as all private persons, and furthermore that the RCRA statute treat Federal facilities the same as other key environmental laws.

So you're putting all these conditions on, as well?

Mr. HOLMES. I hate to get into semantics, because I think it degrades the process.

Senator MITCHELL. Yes.

Mr. HOLMES. There are conditions on the Administration's support of the bill. Yes, sir.

Senator MITCHELL. Well, I think I understand your view and the difficult position in which you find yourself. I must say that it is disheartening to have a representative from the Environmental

Protection Agency here in effect disclaiming what is the legal and moral responsibility of the Environmental Protection Agency.

I know that you are part of a team, you are part of the Administration, and you've got to accommodate the interests of the agencies of the Administration, but I don't have the slightest doubt in my mind that if this were EPA alone here testifying, not constrained by the views of DOE or DOD, that there can't be any approach other than waiver of sovereign immunity. I think you're kind of unfortunate—nothing personal. These are fine gentlemen, but you are kind of weighted down by the views of the agencies here represented with you.

But I have to say in conclusion that we will do the best we can to address all of the issues that you raised as fairly and as openly as we can, but I am very deeply disappointed, particularly in the views of the Department of Energy at trying to, in effect, hold this bill hostage to things that it wants in the other broader bill. That's not the approach we are going to take. We are going to proceed with this bill. If it is with the Administration's auspices, fine. If Senators want to vote against making the law apply to the Federal Government, they'll have that choice. The Administration obviously will have the opportunity to persuade them to that point of view.

But I think it's better if you had come in and said, "Look, we've got these concerns. We want to address them. We want assurance that they will be dealt with openly and responsibly." That's one thing. But I'm just one Senator—

Senator METZENBAUM. You're not one Senator. I think you speak for at least two Senators on this committee because it seems to me there is some total impropriety when an Administration that is always complaining about our having laws that are applicable to business and requiring business to do certain things—here's a situation in which the law is applicable to business and the government's position now is that the government should be exempt from those very laws that are applicable to others in commerce.

I think it is imperative that we move this bill very rapidly, and I want to say to you, Senator, that you have my wholehearted support and I will assist you in every way possible.

Senator MITCHELL. I thank you, Senator.

I'm going to have to leave to go hear Mrs. Chomorro. I'm late now. With that, I'd like to turn the hearing over to you, Senator Metzenbaum, if I might.

Thank you very much, gentlemen, for coming. We look forward hopefully, ultimately, to getting both this bill and a good RCRA bill passed in this Congress.

Thank you very much.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Mr. Baca, we're happy to hear from you for five minutes.

The Chair wishes to indicate that, although I'm not the majority leader, I, too, do want to hear Mrs. Chomorro if it is possible. Please proceed, Mr. Baca. I might tell you I have an opening state-

ment indicating my strong support for this legislation which, with unanimous consent, I will include in the record at an appropriate point.

[Senator Metzenbaum's statement follows:]

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, U.S. SENATOR FROM THE STATE OF OHIO

Mr. Chairman, I appreciate the Chairman holding this hearing today on S. 596, the Federal Facility Compliance Act of 1991. I applaud his efforts and those of the majority leader who authored this bill and helped get it through the committee last year. As a cosponsor, I'm ready to assist them in moving the bill to the floor for prompt passage this year.

I feel very strongly about the issue. If we are serious about protecting our environment, we cannot have a double standard which punishes private companies and individuals who break environmental laws but allows the Federal Government to escape fines and penalties when it pollutes.

The threat of strong enforcement actions, including the assessment of fines and penalties, encourages the private sector to negotiate timely cleanups and to think twice before polluting again.

This is a very important "club."

And it's exactly what the States and EPA need when dealing with Federal violations of RCRA, the resource conservation and recovery act, which regulates hazardous and solid wastes.

Recent court decisions have created ambiguity about whether States can assess penalties against Federal agencies for RCRA violations. This bill clears up the ambiguity. The bill allows States to impose fines and penalties against Federal facilities that violate provisions of RCRA. And it allows EPA to issue administrative orders against such facilities as well.

These are important enforcement tools. They are desperately needed.

I know firsthand how cavalier Federal agencies have been about environmental compliance. There is a history of careless—even reckless—operation of DOE facilities in my State of Ohio.

Just look at the Fernald uranium processing plant in Hamilton County, OH. The Fernald facility was designed to produce uranium metal for defense production needs.

Fernald has a 40-year history of pollution. In 1986, DOE found degradation of on- and off-site groundwater quality and harmful radon releases, among other problems. It pledged to clean up the site.

I'm frank to say that, it's five years later, and DOE has yet to do the right thing at Fernald. Even though operations have been halted, the site has yet to be cleaned up.

We have a witness here today, Lisa Crawford, who represents the "Fernald Residents for Environmental Safety & Health."

She will tell the committee what it's like to live near a nuclear weapons plant—to find out that one's family may have been exposed to massive quantities of radioactive dust and other contaminated materials. She will tell the committee what it's like to have the government—in this case, the Department of Energy—break its word over and over again about obtaining a thorough and prompt cleanup of the site.

Mr. Chairman, EPA has taken an unusual step and actually used a fines and penalties "club" against DOE for failing to meet certain clean-up deadlines at Fernald, deadlines which were part of a consent agreement worked out between the two agencies over a year ago.

EPA is fining DOE \$412,500. These are stipulated penalties which DOE agreed to pay when they signed the consent agreement with EPA. DOE is now disputing their obligation to pay the penalties and challenging EPA's authority to assess them under the consent agreement.

I believe DOE is dead wrong.

I think EPA can and should be able to bring recalcitrant polluters to justice, even if the recalcitrant polluter happens to be the Department of Energy.

The legislation before us will help EPA enforce its consent agreement at Fernald.

But it's not just the Fernald cleanup that will be helped.

Other Federal facilities in my State and across the Nation that are hotbeds of pollution will also be helped. The threat of punishment is a great motivator.

Federal facilities that violate hazardous waste laws cannot and must not be above the law. They need to know that they will feel the sting of fines and penalties if they break the law just like any private party. I hope we can pass the Mitchell bill once and for all.

Senator METZENBAUM. Please proceed, Mr. Baca.

STATEMENT OF HON. THOMAS E. BACA, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR ENVIRONMENT, DEPARTMENT OF DEFENSE

Mr. BACA. Thank you, Mr. Chairman.

I am pleased to appear before you today to discuss the Department of Defense's views on S. 596. The DOD is committed to environmental compliance. Last September Secretary Cheney emphasized that Defense and the environment is not an either/or proposition. He challenged and tasked the Department to build an environmental ethic into the daily business of Defense. I reiterate that commitment today and I believe we are making significant progress in living up to Secretary Cheney's vision.

I want to emphasize, Mr. Chairman, that we are already subject to all Federal and State law. The primary effect of S. 596 is to make Federal facilities subject to assessment of civil penalties by State regulatory agencies for violations of RCRA. To make our facilities like the private sector in this regard, we agree with the goal of this bill: to achieve better compliance.

DOD also does not shrink from being treated like private facilities. In fact, we do not believe that S. 596 goes nearly far enough.

We believe S. 596 could be a portion of a comprehensive program designed to protect our Nation's environment to improve sovereign. In the past when we talked about Federal agency compliance with environment laws we focused totally on fines and penalties. The heated discussion over these sanctions eclipsed the debate and prevented fuller consideration of other viable and progressive solutions to the improvement in Federal agency compliance with environmental laws.

We believe that these other factors, not just administrative orders, fines, and penalties, are essential components of a foundation that will support our mutual goal: successful and sustained compliance.

First, we need a clear hierarchy of authority over our compliance actions. Quite simply, Mr. Chairman, there is a tremendous ambiguity in the laws over which regulatory agencies have primacy at Federal facility cleanup sites when RCRA, CERCLA, and State hazardous laws can all arguably apply, which has led to confusion, delay, duplication, and added cost.

Second, DOD conducts a number of military essential activities and produces and eventually disposes of military essential equipment and material. Such activities and materials include ordnance, munitions training, handling, and disposal. Accordingly, we recommend that the committee adopt a provision similar in concept to that which exists in the Clean Air Act which allows the President to create a separate body of regulations governing these military essential activities.

Using this same military essential principal, I would like to bring to your attention a third matter regarding the inconsisten-

cies between how privately-held product-carrying vessels and military vessels are treated under RCRA. This inconsistency has led to the treatment of a military vessel as a RCRA-regulated unit and, as such, potentially subject to comprehensive RCRA waste-handling procedures. Military vessels, like private product vessels, should not be considered RCRA-regulated entities.

A fourth issue is employee liability. We appreciate the committee's effort to clarify that Federal employees cannot be held personally liable for civil penalties.

Our fifth issue is one which we believe will benefit ourselves, as well as the States. We believe language which would clarify it when it is appropriate for Federal agencies to pay fees to State agencies to support their ability to review our permits and studies is needed.

Sixth, we are concerned about the inclusion of language in S. 596 requiring Federal agencies to perform assessments of the releases of hazardous substances from each solid waste management unit. This provision creates a third duplicative requirement to assess releases. We therefore request that the committee modify this provision to ensure that it does not apply where equivalent CERCLA or RCRA assessments have already been done under proper oversight.

Our next issue relates to the matter of reimbursing EPA for inspections of our facilities. DOD does not support this provision. We believe it is counter to the principal that each department and agency create a budget based on its area of responsibility.

Finally, DOD would request that the Congress amend the bill to rectify a statutory disparity between how federally-owned and privately-owned wastewater treatments are treated. We are seeking amendments only to rectify this inconsistency for our treatment works that primarily manage domestic or sanitary waste similar to waste of municipalities.

Thank you very much, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Mr. Baca.

We appreciate your testimony and the testimony of each of the witnesses on this panel. We will move forward unless Senator Jeffords has objection.

Senator JEFFORDS. No, Mr. Chairman. I don't have any questions at this time. I understand my statement has already been placed in the record. It is good to see you again. It has been almost five minutes since we were at the other hearing together.

Senator METZENBAUM. In just a moment I am going to be turning the committee over to you. I do want to go over and hear Mrs. Chomorro.

I want to thank the members of this panel for being with us this morning. We look forward to working with you on trying to overcome some of your concerns. Thank you very much.

Our next panel consists of: Ms. Shira Flax, Toxics Specialist, Sierra Club; Mr. Gerald M. Pollet, Executive Director of the Heart of America Northwest in Seattle, Washington; and Ms. Lisa Crawford, President of the Fernald Residents for Environmental Safety and Health, Inc.

We are particularly pleased to welcome Ms. Crawford. She will tell the committee what it is like to live near a nuclear weapons plant and find out that one's family may have been exposed to

massive quantities of radioactive dust and other contaminated materials. She will tell the committee what it is like to have the government—in this case, the Department of Energy—break its word over and over again about obtaining a thorough and prompt clean-up of the site. And I want to say that I know of Ms. Crawford's leadership and her activities in this organization.

We are very pleased that you are here with us. As you know, on previous occasions I have indicated my concern and have been involved and been down to the area.

Excuse me for leaving. It is not for lack of interest, but it is because I do think I ought to go over to hear Mrs. Chomorro. You may be sure that I will read your entire statement and that of each of the other witnesses.

Thank you very much for being with us. I look forward to working with you.

Senator Jeffords will now preside until the conclusion of this hearing. Thank you, Senator Jeffords. And thank each of the witnesses.

Senator JEFFORDS. Thank you, Mr. Chairman. It is a pleasure. Please proceed with your statement.

STATEMENT OF SHIRA FLAX, TOXICS SPECIALIST, SIERRA CLUB, WASHINGTON, DC

Ms. FLAX. Good morning, Mr. Chairman.

I am testifying on behalf of over one-half million Sierra Club members. The reason why I am testifying is the following: Federal facilities, particularly Department of Energy production sites, are the most egregious toxic polluters in their host State. For that reason, Federal facilities are of very much concern to all Sierra Club members who live in that State.

We also have Sierra Club members who live near Department of Energy and Department of Defense facilities and their health is much affected by contamination.

I just want to reiterate some of the things and respond to some things that were said in earlier panels.

I think the assistant director from the Department of Ecology at Washington State put it very well. Enactment of this law will mean the following: for the first time, citizens who live near these facilities will feel that regulators have the very tools that will enable them to be vigilant.

For that reason, the Sierra Club has made enactment of S. 596 one of its highest legislative priorities, and we ask this committee to do what it did in the last Congress, and that is to favorably and unanimously report out the bill as it has been offered by majority leader Mitchell.

I just want to make two comments. I want to comment on the position taken by the Administration. In the last Congress, this committee enacted the reauthorization of the Clean Air Act. While that act was proceeding through Congress, Congress and environmentalists at several times had different points of view, but never did environmentalists say we will not support enactment of the Clean Air Act until you, Congress, do specifically what we want.

We have learned not to do that for the following reason: If we make ultimatums—as the Administration did—our views will not be heard.

Our position is the same as the majority leader. We are all open to hear people's views. We are very much willing to sit down and talk, but we simply cannot if all we hear is ultimatums.

Senator JEFFORDS. Let me just interrupt. I appreciate hearing that. Having been one of the negotiators on the Senate team last year with the Administration, we did have some differences of opinions, but I think you are absolutely correct in your judgment there. The worst thing to do is to give ultimatums. I mean that as far as the Administration is concerned, as well. Thank you. Continue.

Ms. FLAX. There is a second thing I just want to mention. During the past congressional recess I met with citizens, EPA regulators, and State regulators at Rocky Flats and Hanford. What they told me was, at least at Hanford, there were ongoing negotiations regarding bringing the low-level Hanford mixed waste stream into compliance with the LDR requirement of RCRA. Apparently there is agreement on a treatment technology.

I also met with Region VIII, in the State of Colorado about Rocky Flats. As was mentioned earlier, they are negotiating a land disposal restriction compliance at Rocky Flats. My understanding is that the action plan of the agreement is now completed. The action plan is to address the issue that was raised by Mr. Schroeder, which is the development of treatment technology.

So, in our opinion, the concern raised by DOE, in effect, is being addressed at the sites and apparently very cooperatively with the regulators. I just want to bring that to the attention of the committee.

Senator JEFFORDS. Thank you.

Ms. FLAX. In conclusion, I just want to remark that, as our written statement says, without passage of the Federal Facilities Compliance Act of 1991 we feel that everything ranging from samples, tests, complying with provisions of agreements, all of that will be affected, if the regulators do not have administrative and judicial civil penalty authority.

With that, we would like to thank you.

Senator JEFFORDS. Thank you very much for your excellent testimony.

Lisa Crawford.

STATEMENT OF LISA CRAWFORD, PRESIDENT, FERNALD RESIDENTS FOR ENVIRONMENTAL SAFETY AND HEALTH, INC., HARRISON, OHIO

Ms. CRAWFORD. My name is Lisa Crawford. I am speaking on behalf of FRESH, Inc., which stands for Fernald Residents for Environmental Safety and Health. Our organization arose out of a need in the community for more information and public action when we learned that the Fernald Plant, the Feed Materials Production Center, had released massive quantities of radioactive dust and other contamination into our air and soil.

I now reside 1½ miles south of the Fernald facility. I formerly lived in a rented farmhouse right across the street from the site from December of 1979 until April of 1985. My family was unfortunate enough to be told in January of 1985 that we had been drinking, cooking, and baking with contaminated water from our well.

The U.S. Geological Survey had done a well-testing study in 1981 and 1982 and had confirmed that the well we were using had been contaminated with uranium from the FMPC with a level reading at 190 micrograms per liter. Here it was January, 1985, and we were just then being informed of this—four years later—a little after the fact.

We were devastated and we were frightened by this news. We had no one to turn to for answers—not the plant, not the Department of Energy, and not the Federal Government. No one would answer our probing questions, allay our fears, or be forthcoming with pertinent information. I repeat, no one.

So we took it upon ourselves to confirm our worst fears, and now, six years later, those fears have been confirmed. We live every day with a knowing fear that one day one of our family members or ourselves may become deathly ill or possibly die from this unnecessary and uncalled-for exposure to radiation and contamination.

At the time we were informed of the well contamination we specifically asked to be provided with clean, uncontaminated water. Neither the former contractor, National Lead, Incorporated, nor the Department of Energy, thought it was necessary because the levels in the well were very low, they told us. Low, I ask you? One hundred and ninety micrograms per liter of uranium is not low—not low by my standards, and certainly not low by many others.

Now, six years later, and six contaminated wells later, DOE is providing residents of Fernald with bottled water, but only if their wells read above 2.7.

The FMPC is a dirty, dusty, and antiquated facility that has lived its life span. We now have a nuclear disaster literally sitting on top of our community. Living in the Fernald area resembles living in a war zone. The residents sit on pins and needles day and night wondering when the next contaminated well will show up, when they will have another spill of radioactive substances, or when the next disaster will strike.

Living with the fear of the unknown has caused undue stress upon the residents of Fernald. The bottom line here is: the residents of Fernald feel like they have become guinea pigs for the Department of Energy. Our health and safety was sacrificed for the production of nuclear weapons. In plain and very simple english, bomb building was far more important than human life was with the Department of Energy.

One of our biggest problems with the Fernald community residents is fear. They fear the 40 years of radioactive leaks. They are afraid of the impact on their health and safety and, most important, the health and safety of our children. They are afraid of the future, that it might bring latent cancers and illnesses from Fernald's pollution.

The cause of these fears hinges on mistrust of the Department of Energy and the lack of public confidence—lack of confidence in a

promise and a commitment of cleaning up the destruction of the last 40 years.

For 40 years we trusted that the government would watch out and protect our health and safety. They did not. We have been abused, our environment insulted, and we have been lied to over and over. It is our firm opinion that the Department of Energy honestly and wholeheartedly believes that it is above the law.

The cleanup of the Fernald plant and other nuclear weapons must begin now, today. There must be long-term planning for this cleanup. This cleanup must be done in a responsible manner. Adequate funding and oversight authority must be given to agencies independent of the DOE, agencies like the U.S. Environmental Protection Agency.

The U.S. EPA has demonstrated it, too, wants the facility cleaned up, and, since their involvement in the remedial investigation and feasibility study process, has brought in some long-awaited independent oversight to Fernald.

The Department of Energy has broken its word on more than one occasion. They do not know what the word "deadline" means. They miss deadlines on a regular basis.

Even when they sign written agreements, they break those. They broke the agreement with the State of Ohio, they broke the agreement with the U.S. EPA's compliance agreement, they broke and missed the deadlines of the process, their track record for follow-through within their agreements is non-existent. That is why we believe the U.S. EPA should be given the authority to force the DOE to obey and comply with the laws. Without this authority, the American public has virtually no protection. Public confidence has already been marred and if this happens will altogether be shattered.

At the Fernald facility right now the U.S. EPA and the DOE are in an all-out war over whether fines can be levied against the Department of Energy. Since the DOE broke the laws and missed the deadlines, we believe that the U.S. EPA should have the authority to levy these fines. This is the only clear way that the DOE will get the message—the message that they are not above the law, as they seem to think they are. If this were a commercial industry, they would have been fined and probably arrested and their business destroyed. The DOE should not be given preferential treatment. They should have to comply with the laws and have oversight just like private industries in this country do.

In closing I want to encourage you to put forth the Federal Facilities Compliance Act. I want to encourage you to give the Department of Energy oversight by another agency and by States. I want to encourage you to make the DOE comply with the laws of this country. I want to encourage you to let the U.S. EPA levy fines against the DOE for noncompliance and failing to meet their deadlines and agreements. I want to encourage you to remember the residents of Fernald and other nuclear weapons production facilities—residents who live in the shadows of America's bomb planes, residents who have been kept in the dark and lied to for the past 40 years. I want to encourage you to think about what will happen to the public's confidence if these issues are not looked at and dealt with soon.

I also want to encourage you to please hold the Department of Energy's feet to the fire and make them accountable, not only to the Congress, but to the entire American public.

Thank you.

Senator JEFFORDS. Thank you. That's very disturbing and very important testimony and we appreciate it.

Mr. Pollet.

**STATEMENT OF GERALD M. POLLET, EXECUTIVE DIRECTOR,
HEART OF AMERICA NORTHWEST, SEATTLE, WA**

Mr. POLLET. Thank you, Mr. Senator.

My name is Gerald Pollet. I am Executive Director of Heart of America Northwest and legal counsel for that 16,000 member organization and Legal Advocates for Washington.

I am here representing the views of not only the 16,000 members of our organization, but literally hundreds of citizens who have spoken about this bill at DOE hearing after DOE hearing in the States of Washington and Oregon.

In the words of former Congressman Don Bonkers, who is a member of my board of directors, "The Columbia River is the lifeblood of our region." It flows through the center part of the massive contamination of the Hanford Nuclear Reservation.

Today we are here not to talk about fines and penalties for the past violations compounded by the Department of Energy over the last 45 years. We are here today to talk about the Department of Energy's massive noncompliance with America's environmental laws. We are here today to talk about the brash, illegal discharge of mixed wastes into Washington State's soils, the illegal storage of wastes that could explode in Hanford's high-level nuclear waste tanks. As we speak, the Department of Energy is breaking the law.

Those poisons that the Department of Energy continue to illegally discharge into the soil at Hanford are pushing other wastes from the 440 billion gallons that they have already discharged towards the Columbia River at an ever-increasing pace. The U.S. EPA recently released a study saying that almost all those discharge streams were illegal. But the Department of Energy is doing nothing to speed up cutting off those discharge streams. And why should they? They are no different from any other business with their production timelines and priorities, and they have no fear of any penalty being levied against them for those massive violations.

Yesterday citizen groups from facilities all over the country—citizens like Lisa Crawford who live in the shadow of the Department of Energy's nuclear weapons production facilities and who live downstream, as do the constituents of my organization—released a report card on the Department of Energy's performance this past year. Contrary to the testimony that this committee heard earlier, the budget priorities of the Department of Energy are not moving towards compliance. In fact, we gave the Department of Energy an "F" for its budget priorities this year.

The Secretary of Energy has proposed a budget to you for fiscal year 1992 which is \$1.75 billion short of his own department's "requirements" level in their Five-Year Plan for compliance and environmental restoration and waste management. It is \$66.5 million

short of the department's own estimate of compliance requirements. The rhetoric we have heard is wonderful, "We are committed to compliance." The evidence is abominable.

At Hanford, the Department of Energy's proposed budget for fiscal year 1992 is \$13.8 million short of what each activity data sheet adds up to for meeting the legal requirements of the Hanford Clean-Up Agreement for RCRA groundwater monitoring well installation, and other RCRA requirements at the site in compliance with the Hanford Clean-Up Agreement. That does not sound to us like a commitment to cleanup, and it isn't. And it isn't a commitment to compliance. And it isn't a sound budget priority for compliance because there is no fear of penalties or fines.

Breaching the Hanford Clean-Up Agreement, as the Department of Energy has now done on a massive scale, delaying project after project, putting in only three groundwater monitoring wells around the leaking high-level nuclear waste tanks that are called the single-shell tanks, leaking high-level nuclear waste tanks, they put in three out of eleven wells that they were required to in 1990, and the reason was they diverted funds to other projects. And they admit they diverted the funds.

Today these illegal discharges are going to continue, and they will tomorrow unless S. 596 becomes law. As late as November of 1987 Westinghouse Hanford Company management undertook illegal discharges to crib U12 after submitting a closure permit to the State of Washington representing to the State that the crib was inactive. Then they opened a new crib with no construction permit. Westinghouse management knew it was illegal, and they decided to do it anyway, and they discharge as we speak into an illegal unit massive quantities of mixed waste. That is why the representative of the Department of Energy today told you they want mixed wastes exempted from RCRA.

Finally, let me conclude by reading from the Department of Energy's excerpt of their response to public comments on the Hanford cleanup five-year plan.

Many people said that DOE's opposition to the compliance and trust fund bill shows that DOE isn't serious about changing its culture. That isn't true. We are committed to getting into compliance with State and Federal environmental regulations. We already comply with most. The Tripartite Agreement, Hanford's 30-year cleanup plan, guides us toward compliance with the rest. "Mind you, they are in massive violation of the eight single-largest milestones this year." We oppose the two bills because we believe the existing system works and gives more flexibility to respond to new issues.

I submit to you that what DOE seeks is flexibility to continue their discharges because they have no current fear of fines and penalties, and we urge you to move expeditiously to passage of S. 596.

Thank you.

Senator JEFFORDS. I thank you all for your very poignant and excellent testimony, which will be very helpful to the committee.

I also want to get over to the floor to listen to Mrs. Chomorro, though being a former House member I know how to sneak in the back so I won't embarrass anybody, but I do want to get over there.

Without objection, the following will occur. Your statements will be entered in their entirety into the record. I know some of you ab-

breviated them. Secondly, the record will be held open for a period of two weeks for questions to you from members or for further submissions for the record. Finally, I would enter into the record the statements of Senators Lautenberg, Chafee, Warner, Durenberger, and Simpson at this time.

[The statements referred to follow:]

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE
STATE OF NEW JERSEY

Mr. Chairman, I thank you for holding this hearing today on S. 596, the Federal Facilities Compliance Act of 1991. And I commend our distinguished Majority Leader for introducing this important legislation, which I have cosponsored.

The bill answers a very simple question. Does a town with a contaminated water supply care whether the polluter was a private corporation or Federal installation? Or does that town really care about getting that water cleaned up?

The answer is fairly obvious. People expect our environmental laws to guarantee protection and cleanup, regardless of who the polluter is.

That's what Congress intended back in 1976 when we passed the Resource Conservation and Recovery Act. We intended that States could use the same enforcement tools against Federal facilities as they use against private parties.

And the Federal court in Maine has properly interpreted the law's intent. So why are we introducing this bill? Because some misguided courts and the Administration have concluded that the law creates a double standard. They've suggested that States can obtain fines and penalties against private parties that violate RCRA, but not against Federal agencies.

I think the law is clear on this point. But to assure that courts universally follow the law's original intent, this bill clarifies the principle.

The key is for States to have all the enforcement tools in their arsenal. The need is obvious. DOD and DOE together annually generate about 20 million tons of hazardous or mixed hazardous and radioactive waste.

And double standards for enforcement may be contributing to double standards for compliance. In fiscal year 1990, 59 percent of inspected Federal facilities had RCRA violations. That's compared to about 51 percent for private facilities.

Mr. Chairman, in the past we've heard some arguments against clarifying State enforcement powers. Some have argued that States will abuse fines and penalties. Some have argued that States will interfere with cleanup priorities.

But without any evidence that States will abuse enforcement powers, some have suggested that we have to be careful when it comes to Federal facilities. We're encouraged to hear from the staff that the Administration's position may be changing. These past concerns and arguments may finally be giving way to a wiser approach.

We hope to get some clarification of whether the Administration is finally moving in the right direction. Because the American people don't buy the old arguments against this legislation. The public doesn't want to protect Federal polluters from environmental laws. They want environmental laws that protect them from Federal polluters.

Our mission must be to assure compliance with our laws by everyone—whether it's the Defense Department or a private company.

Mr. Chairman, again I thank you for holding this hearing today, and I look forward to working with you for swift passage of S. 596.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF
RHODE ISLAND

Mr. Chairman, we are here today to hear testimony on S. 596, a bill introduced by Senator Mitchell giving the States the authority to impose fines and penalties on the Federal Government for failure to comply with the resource conservation and recovery act. As all of the members of this subcommittee and the witnesses well remember, we tried to address this important issue last year, but were unable to do so before time ran out in the 101st congress.

As I indicated last year when the predecessor to S. 596 was before the environment and public works committee, the legislation has a noble purpose. That purpose is stated in the enacting clause: "A bill to provide that Federal facilities meet Federal and State environmental laws and requirements and to clarify that such facilities must comply with such environmental laws and requirements."

No one can disagree that the facilities of the Federal Government must, comply with all environmental laws. The fact is, Mr. chairman, that the Federal Government is already required to do so, just like any other private citizen or corporation. No change in the law is required to bring about this result.

What S. 596 would do is give the States the additional tool of fines and penalties to ensure compliance with the substantive requirements of rcra. Under current law, if a Federal facility fails to comply, States and citizens can—and do—take enforcement action. In addition to filing actions under the citizen suit provision of rcra, States can issue compliance orders, which are fully enforceable in a court action for injunctive relief.

S. 596 would make the Federal Government subject to State and local fines and penalties if it violates RCRA or State or local hazardous waste laws. It waives sovereign immunity completely and unconditionally.

Last year, the administration opposed legislation that was virtually identical to the bill before us today. In particular, the departments of defense and energy expressed serious concerns that devoting Federal funds to fines and penalties would divert scarce Federal resources away from the most important goal: that of cleaning up contaminated sites. In addition, those departments stated their belief that aggressive State attorneys general would disrupt Federal budgets and clean-up priorities by imposing enormous fines and penalties.

Last year, I tried to address some of these concerns by introducing substitute language that would have waived sovereign immunity unconditionally for ongoing compliance violations. In contrast to S. 596, though, my substitute would have waived immunity for failure to clean up old, inactive sites only in cases in which such failure violates an agreement or commitment to clean up. The substitute would not have affected the Federal Government's ongoing obligation to clean up its facilities, but would have allowed more Federal dollars to be devoted to that end.

Unfortunately, S. 596 raises the same concerns expressed last year. Despite these problems, we understood that the administration had decided to support S. 596, provided that this committee consider issues that make compliance with RCRA by the Federal agencies difficult or impossible. Such a change in position would have been a significant step forward. However, according to the testimony submitted today, the administration will continue to oppose S. 596 until certain conditions are met.

Mr. Chairman, I am extremely disappointed that the administration was unable to express its conditional support for S. 596. I urge the administration to reconsider its position. If that change can be accomplished, the climate for this committee's consideration of the administration's proposals to make changes in rcra will be greatly improved.

Thank you, Mr. Chairman.

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE
COMMONWEALTH OF VIRGINIA

Mr. Chairman, today the Committee will again hear testimony on the Federal Facilities Compliance Act which was addressed by the Committee last session.

Mr. Chairman, I continue to support appropriate measures which would improve the Federal Government's compliance with environmental laws.

In recent discussions with Deputy Assistant Secretary Baca, I was encouraged by the Department's willingness to offer some effective solutions to this problem by resolving the issue of fines and penalties for compliance failures and corrective action.

I hope this morning that the Committee will hear testimony which reaffirms this position.

I must also indicate that I believe there are legitimate issues which I raised during the Committee's earlier review of this legislation which have not been fully addressed.

My primary concern is that by amending existing law to subject the Federal Government to fines and penalties for violations of the hazardous waste laws, S. 596, may actually delay clean-up efforts in some cases.

The cost of compliance and clean-up will be significant, but it is a job that must be done. I am sympathetic to the concerns expressed by States who want hazardous waste sites within their borders cleaned-up as soon as possible.

However, with the constraints placed on the Federal budget in the foreseeable future, this Committee must ensure that limited funds that are available for compliance and clean up are used effectively.

I remain concerned that funds allocated for payment of fines and penalties could reduce the amount of funds available for compliance and clean-up efforts.

I look forward to the testimony this morning and hope the witnesses may be able to provide more detailed information on the budget impact of this legislation.

I would also encourage the Administration to work with this Committee and the Armed Services Committee so that we can improve the compliance with environmental laws at Federal installations.

OPENING STATEMENT OF HON. DAVE DURENBERGER, U.S. SENATOR FROM THE STATE OF MINNESOTA

About this time a year ago the distinguished Ranking Member of this Committee, Senator Chafee, began an effort to find a compromise on Federal facilities cleanup legislation. It was an effort that was supported by all of the Republican members of the Committee, this Senator included.

Several meetings were held with Administration representatives from all of the departments and agencies involved. Legislation was drafted by Senator Chafee and submitted to the Administration for comment. The legislation would have implemented the specific proposal made by the Administration that the Government establish a priority list for cleanup projects and that fines and penalties by States under RCRA or other hazardous waste laws be forestalled so long as the Government diligently pursued cleanup according to the priorities established.

I was not entirely persuaded that the concept embodied in Senator Chafee's proposal would work. I didn't think we could get an agreement on priorities that would reflect a consensus among all parties. Nevertheless, I followed the lead of my Ranking Member and withheld my support from the Mitchell bill.

As it turns out, we can't even get agreement on the concept that the Administration proposed. Senator Chafee received no reply from the Administration on his legislation. And they did not counter with any specific legislative proposal of their own. Nothing has been accomplished in a year of legislative effort.

Our experience is instructive, perhaps, with respect to the frustrations the States face as they attempt to get these Federal agencies to cleanup their polluted facilities. Senator Chafee and the Republican members of the Committee were trying to be of assistance. The door was wide open. And we were stonewalled.

I should hasten to add that not all of the Executive Branch gave us the cold shoulder. Most of the participants in this process negotiated in good faith and wanted a compromise. Even OMB was in the good guy camp on this one. But one agency refused to join in a compromise. The Department of Energy has no intention of addressing this problem on anybody's terms but its own. The whole of the Government—executive, legislative, Federal and all of the State governments, as well—appear ready to put this issue to bed and get on with the cleanup. But not DOE. It stands alone outside of the commitment to good faith solutions which the rest of the Government shares.

We have lost ground over the past year. The last time a DOE witness appeared before this Committee he indicated that the Department of Energy would seek site-specific agreements with the States and would be willing to submit to stipulated penalties within such agreements, if DOE failed to live up to its promises. Now, Mr. Duffy asserts the right to set aside the few agreements that have been made, because there is, in his words, no "technological tooth fairy".

It is time to recognize the DOE position for what it is: unyielding. It's time to take S. 596 to the Senate floor and see how much support there is for the Department's cleanup program. I think the American people should hear the full story of Fernald, Hanford, Rocky Flats and the other facilities under DOE's stewardship. I would ask that the distinguished Majority Leader add me as a cosponsor of S. 596, the Federal Facilities Compliance Act, and would promise him my active support to assure that legislation is enacted at the earliest possible date.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

I am supportive of the Administration's work to achieve compliance with S. 596 while minimizing the operational and financial impact of compliance. Since the Administration's exact language is not yet finalized to address issues which would have significant impact on the Department of Defense and the Department of Energy's operations, I would like to request, Mr. Chairman, that a package of amendments from the Administration be considered after the reporting of this bill. If we can successfully consider the Administration's concerns with the bill, I am prepared to vote with my colleagues to report this legislation to the full Senate.

Senator JEFFORDS. If there is no other business at this time, I hereby declare the hearing closed.

[Whereupon, at 11:15 a.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and the bill, S. 596, follow:]

PREPARED STATEMENT OF LARRY ECHOHAWK

Mr. Chairman and members of the Senate Committee on Environment and Public Works' Subcommittee on Environmental Protection:

I am Larry EchoHawk, Attorney General for the State of Idaho. I appreciate the opportunity to provide testimony to you on behalf of the State of Idaho and the National Association of Attorneys General in support of the Federal Facilities Compliance Act of 1991 (S. 596), a bill to clarify the scope of the waiver of Federal sovereign immunity contained in Section 6001 of the Resource Conservation and Recovery Act (RCRA).

Despite the hysteria that Federal agencies have generated, S. 596 is a simple, straightforward piece of legislation. S. 596 is not a radical departure from existing law, but rather is an attempt to reconfirm Congress' original intent that the waiver of Federal sovereign immunity contained in RCRA be the same as the waiver of Federal sovereign immunity contained in other Federal environmental laws such as the Clean Air Act, Clean Water Act and the Safe Drinking Water Act. This bill simply provides that Federal agencies are fully subject to State administrative and civil enforcement actions for violations of Federal and State solid and hazardous waste laws at Federal facilities, including civil and administrative penalties, a result we contend was part of Congress' original intent in enacting Section 6001 of RCRA.

Although the Federal Facilities Compliance Act of 1991 is simple and straightforward, its importance must not be underestimated. Because of the Administration's assertion that the unitary executive theory precludes EPA from imposing fines and penalties, and because some misguided courts have construed Section 6001 of RCRA as not waiving the United States' sovereign immunity to State enforcement actions for fines and penalties, there is presently no effective means of forcing Federal agencies to comply with Federal and State solid and hazardous waste laws.

While Federal agencies continue to assert that they are voluntarily complying with Federal and State solid and hazardous waste Laws, the facts belie this assertion. Daily we are confronted with new disclosures about the scope and extent of solid and hazardous waste problems at Federal facilities. This committee has previously heard the litany of problems at the Fernald, Rocky Flats and Hanford Federal facilities as a result of the Nation's nuclear programs. Yet, even with the extensive examination these facilities have undergone, we have only begun to see the tip of the iceberg of their waste management problems. For example, Just this last Sunday, I read in the newspaper that DOE recently discovered more than 120 million gallons of livid radioactive waste was intentionally discharged into the ground at the Hanford Nuclear Reservation from 1946 to 1966. The scope and extent of the waste management problems at Fernald, Rocky Flats and Hanford are a testament to the fact that voluntary compliance is not working.

Indeed, the President has even conceded that voluntary Federal compliance is a failure and that Federal facilities are among the Nation's worst polluters. During his campaign for the Presidency in 1988, President Bush stated: "Unfortunately, some of the worst offenders are our own Federal facilities." Moreover, even the GAO concedes that the Federal agencies are in serious noncompliance with Federal and State solid and hazardous waste laws. R.R. Rip. No. 101-141, 101st Cong., 1st Sess. 3 (1989). Thus, the need for a strong SPA and State role in overseeing environmental compliance at Federal facilities is apparent. This committee recognized this fact last year when it unanimously reported out S. 1140, a bill identical to S. 596. The House of Representatives also recognized this fact when it overwhelmingly passed R.R. 1056, which Has also similar to S. 596.

This legislation is absolutely essential if the mandates of Federal and State hazardous waste management laws are to be carried out in a timely and meaningful manner. State environmental regulatory authority over federal facilities is dependent upon clear and unambiguous Federal waiver of sovereign immunity. S. 596 will clarify Congress' intent to fully waive sovereign immunity in RCRA. In the absence of such a clarification, enforcement by the States against a federally operated facility is essentially limited to protracted arm twisting which leads to, song other things, delayed compliance with the law.

To date, Federal agencies, in concert with the Department of Justice, have steadfastly fought State attempts to impose penalties for violation of hazardous waste laws. Federal polluters have successfully argued in some courts that RCRA did not clearly and unambiguously waive the sovereign immunity of the United States for enforcement of penalties against Federal agencies for violations of Federal and State solid waste laws. As a result, while State and local municipalities and private industries are held accountable under State and Federal environmental laws, Federal facilities are not. This double standard must be eliminated. Even President Bush conceded this point during his 1988 campaign for the Presidency when he stated: "As President, I will insist that in the future Federal agencies meet or exceed environmental standards; The government should live within the laws it imposes on others."

S. 596 has been designed to curb Federal non-compliance in two ways. First, the bill makes absolutely clear that the States have the right to fully enforce solid and hazardous waste laws against Federal facilities. Second, the bill provides authority for the Environmental Protection Agency (EPA) to use administrative orders to resolve regulatory violations at the federal facilities.

The Administration has opposed this legislation in the past because it contends that States will act irresponsibly. It contends that allowing State enforcement actions against Federal facilities for violation of Federal and State hazardous waste laws will upset Federal cleanup priorities and will allow a raid on the Federal treasury. Neither of these contentions withstand scrutiny.

The Administration has expressed a concern that State enforcement actions will interfere with Federal priorities for clean-up. The absurdity of this argument becomes apparent when the facts are examined. Although DOD is currently developing a priority system based on the worst-first approach, this action is not yet completed. The DOE has only within the past few years begun working on a plan for waste management. Other Federal agencies are in a similar situation. Thus, any concern about State enforcement actions interfering with federal cleanup priorities is misplaced. How can State enforcement actions interfere with Federal clean-up priorities that do not exist?

Even assuming Federal cleanup priorities are established, the Congressional Record shows "Congress has by statute already given EPA and the States a principal vote in establishing national cleanup priorities." In the Superfund Reauthorization Act, "Congress rejected the idea that Federal facility polluters should have control over the pace and type of clean-up." 135 Cong. Rec. H 3915 (July 19, 1989).

Simply put, the Administration's argument that the States will upset cleanup priorities is a red herring. States have as much if not more interest in seeing that Federal facilities are cleaned up in a timely fashion as do the Federal agencies that created the problems. We recognize that there are limited dollars and that the problems that have been created over the past fifty to sixty years can not be remedied overnight. States also have limited resources to devote to these issues. Thus, States will not use enforcement actions to change Federal priorities where a Federal agency is making reasonable efforts to clean up a facility. Instead, a State will initiate an enforcement action only if a Federal agency is refusing to make reasonably diligent effort to clean up a federal facility.

Finally, it should be noted that the States are already working with the Federal agencies to establish cleanup priorities. Thus, we find it anomalous that the Administration takes the position that the States are out to establish self-serving cleanup schedules.

The Administration charges that States will impose excessive fines and penalties which will result in a raid on the treasury. As mentioned previously, other environmental statutes include clear waivers of Federal sovereign immunity. There is no evidence to indicate that under these statutes the States have acted irresponsibly by exacting excessive fines or penalties. Nor is there reason to believe that the States would do so under RCRA. Indeed, in a letter from the OMB reviewing the budget impact of R.R. 1056, a bill similar to S. 596, it was noted that total Federal compliance costs over time cannot be estimated, but it was thought unlikely that they would change significantly as a result of the bill.

In truth, the amount of the penalty is almost irrelevant. Rather, it is the very fact of a penalty and the associated publicity that makes it an effective deterrent to environmental non-compliance. The deterrence factor should not be underestimated. Under other environmental acts where Federal sovereign immunity has specifically been waived, Federal compliance is high. Under RCRA, EPA records show that Federal compliance is low. 137 Cong. Rec. S. 2948 (March 7, 1991).

The time is past where a Federal facility should be allowed to continue to be a major violator of its own laws. S. 596 simply remedies this inequity and puts an end to the anomalous and abhorrent behavior of the Federal agencies.

Because Federal facilities have disregarded our environmental laws, lives have been endangered. This endangerment will not end until Federal facilities are required to live by the same rules as everyone else. To hide behind the argument that dollars are scarce ignores the fiat that dollars will always be scarce. That does not justify a smokescreen of irresponsibility on the part of the Federal facilities and agencies. Rather than costing the treasury, the passage of the bill will bring to a halt the ever-developing costs of clean-up by requiring compliance of the recalcitrant Federal facilities. It is expected that it will take DOD 25 years, at a cost of over \$20 billion, to clean up out military installations. Some of that exorbitant cost might have been avoided had Federal facilities been required to comply with solid and hazardous waste laws or face the prospect of fines and penalties and the ensuing publicity. Ensuring environmental compliance now will save the taxpayer millions of dollars in the future. The bill will act as a preventative measure as well as a cure.

The argument has been made that the amount of penalties will reduce the amount of monies available for cleanup and that therefore no penalties should be imposed. This argument is not unique; it is made by all violators. If this line of reasoning were accepted, there never would be a penalty for any environmental violation; yet, it is precisely the penalty that gets a violator's attention.

The issue of Federal compliance is of vital importance to the State of Idaho. We in Idaho are only beginning to wrestle with the thorny issues relating to environmental compliance at Federal facilities. Idaho is home to DOE's Idaho National Engineering Laboratory (INEL). INEL was established in 1949 as an area for testing of nuclear reactors, fuel reprocessing plants and support facilities related to national defense programs and other nuclear research activities. These activities generate significant quantities of radioactive, hazardous and mixed wastes.

As early as 1973, the Federal Government began promising the people of Idaho that it would address threats to the environment, and particularly the Snake River Plain Aquifer, caused by past and present solid and hazardous waste management practices at INEL. The promised compliance and remedial measures, however, have been repeatedly postponed over the past 10 years, while the amount and nature of the waste generated and stored at INEL continues to increase. As a consequence of DOE's unkept promises, the confidence of the people of Idaho in DOE activities at INEL is severely eroded. Passage of S. 596 would give Idaho the ability to enter into an enforceable consent order with DOE to address pressing solid and hazardous waste issues at INEL. Without this legislation, Idaho will remain in the hamstrung position of hoping that DOE follows through with its promises. This result is neither fair nor equitable. Thus, I urge you to pass S. 596 so that Idaho and other States will have the ability to require this and similar promises by the Federal Government to be kept.

PREPARED STATEMENT OF TERRY HUSSEMAN

Good morning Mr. Chairman and Members of the Committee. I am Terry Husseman, Assistant Director for Waste Management of the Washington Department of Ecology. I am here on behalf of Governor Booth Gardner and representing the National Governors' Association, which he chairs. Governor Gardner would like me to convey his regret that he cannot be here in person, and to assure you that swift passage of the legislation you are considering today is a high priority for him personally and for the National Governors' Association.

KEY RECOMMENDATIONS

Because I know your time is limited, I would like to summarize the governors' views and recommendations. I have also attached the report on environmental compliance at Federal facilities approved last year by the Governors' Association, and ask that it be included in the record of this hearing.

Stated simply, the Governors strongly urge swift adoption of S. 596. It is essential that Congress act quickly to clarify the waiver of sovereign immunity under the solid waste disposal act with respect to administrative orders and the imposition of fines and penalties against Federal facilities that violate State or Federal law. It is also important to empower the environmental protection agency to collect fines and penalties against Federal facilities.

The Governors' recommendations are based upon several strongly held views.

First, the governors believe in the importance of strong environmental laws administered and enforced by a strong and independent agency. Experience with virtually every environmental program teaches that the vigilance of an independent regulator is an indispensable ingredient for effective environmental protection. The private sector as well as State and local governments face independent assessment of their compliance with our environmental laws. Tough and independent oversight of performance is considered so critical that, as a matter of national policy, States are forbidden to assume responsibilities under Federal environmental statutes unless they convince the U.S. Environmental Protection Agency that they have an adequate program of inspection and enforcement. In all the Nation, only Federal facilities have been allowed to stand above this system and be essentially self-policing.

Second, the Governors believe that those who don't comply with the law must face strong enforcement action. Polluters must know that they can and will be punished swiftly and directly if they disregard the law. If violators cannot be penalized for misconduct, they have essentially a "free" period of noncompliance until an injunction can be enforced to end the violation. By then, the original problem may have become enormously more complicated and expensive to resolve, and the benefits of pollution prevention forever lost. Again, in our Nation, Federal facilities stand alone in claiming immunity from fines and penalties for environmental misconduct.

Finally, the Governors are very disappointed and dissatisfied with the record of environmental compliance at Federal facilities. Because this dismal record has now been well documented, I won't belabor the point. I recognize and appreciate the new attitude prevailing in at least some Federal agencies. Secretary Cheney and Admiral Watkins are to be commended for bringing a new attitude to their departments. None of that, however, changes the fundamental fact that Federal facilities have been among the very worst violators of environmental laws.

SOVEREIGN IMMUNITY

Unfortunately, both departments' recognition that action is needed has stopped short of recognizing that enforceability is critical to the development of efficient cleanup programs. Each department has been quick to claim immunity whenever States have attempted to enforce environmental laws, regardless of the merits of violations cited. These actions to avoid compliance and cleanup both prolong the task and increase overall cost and impact on the environment. In the instance of the Federal resource conservation and recovery act (RCRA), Federal agencies have ignored Congress' intent in section 6001, and have successfully avoided enforcement actions by claiming that the language is unclear.

The Department of Justice has said that the waiver of sovereign immunity in RCRA is not broad enough to allow the imposition of civil penalties and administrative orders, or the imposition of criminal sanctions. Thus, the Justice Department says that enforcement options, other than full blown litigation, cannot be used against Federal agencies.

It is our belief that this stance by the United States is a residue of the Federal Government's past attitude toward waste management. This stance is counterproductive to recent energy and defense initiatives and to the success of our joint efforts to quickly and efficiently clean up Federal facilities. Governor Gardner wholeheartedly endorses the recommendations of the NGA and the National association of attorneys general that:

1. Congress should clearly waive Federal sovereign immunity from the application and enforcement of Federal and State environmental laws, and

2. Congress should enact legislation to improve the U.S. Environmental Protection Agency's ability to regulate other Federal agencies.

S. 596 would do this.

This call for legislation has been supported by the National Governors' Association.

S. 596 IS CRITICAL TO THE SUCCESS OF CLEANUP AGREEMENTS

That Federal facilities are far behind the private sector in initiating environmental compliance and cleanup programs is beyond dispute. So is the fact that many of our largest and most complex waste management challenges lie within the Federal sector.

In Washington, at the Department of Energy's Hanford site, we face staggering quantities of radioactive mixed wastes stored in failing and troublesome facilities. Dealing with these wastes will require decades of highly technical and interrelated

projects, each of which has been agreed to within the Hanford Federal facility agreement and consent order (USDOE, USEPA, and the Washington Department of Ecology, May 1989). This long-sought agreement was issued by the State as an administrative order under the State's authorized hazardous waste management act. The Department of Energy chose to remain silent when asked to recognize it as such.

Mr. Chairman, if Federal facility agreements such as that at Hanford are not clearly enforceable, we stand little chance of ever achieving compliance or effectively completing cleanup. Further, being able to sue to get agencies to comply with agreement terms is little comfort. As you know, litigation is typically used only in the most dire of circumstances, and is most often a last effort after repeated and serious difficulties. When used, litigation often results in extended delays (and in fact may be used as a delaying tactic). Arguments often center on legal defenses such as immunity rather than merits of the case itself. The end result is too often a lack of real action and further erosion of public confidence.

To be effective, both our laws and our Federal facility agreements must be backed up by the same enforcement sanctions that apply within the private sector. States must have the ability to issue administrative orders requiring agencies to comply with environmental statutes or with the terms of legal agreements. Civil penalties must also be a recognized option. They represent an equally important tool, and are often used in differing circumstances. For example, it does little good to issue an administrative order following an intentional or negligent release to the environment (promises of no repetition are fast to come). Our experience in Washington (at both private and Federal facilities) has shown that civil penalties are strong deterrents, even though few penalties are actually issued.

It is also important to recognize that clarifying RCRA's waiver of sovereign immunity will enhance the effectiveness of agreements, but will not replace standard dispute resolution processes. These processes are typically designed to precede formal enforcement actions and offer the opportunity to resolve issues early on. If resolution is not possible, and enforcement actions are taken, the Federal facility would have all standard opportunities for appeal on the merits of the case, for example, State pollution control hearing boards and both State and Federal court systems.

FEARS THAT S. 596 HILL RESULT IN EXCESSIVE PENALTIES ARE UNFOUNDED

One of the most persistent concerns about S. 596 is that it would result in excessive penalties. This argument is not borne out by experience in the private sector, or in those cases where Federal sovereign immunity has been clearly waived.

In Washington, only five penalties have been assessed against Federal facilities in the past five years. These penalties covered hazardous waste, air quality, and water quality violations. They totaled \$79,250, and ranged from a \$250 water quality fine against the bureau of reclamation (uncontested and paid), to \$49,000 against the Department of Energy for a series of very serious violations of our State hazardous waste laws. We were unsuccessful in collecting this penalty due to claims of immunity. It is my belief that States have acted responsibly in enforcing environmental laws and will continue to do so. What we are asking for is your recognition that environmental compliance in the United States needs to be implemented on a level playing field.

Arguments that clarifying State abilities to enforce environmental requirements will result in raids on the Federal treasury also do not take into consideration the following factors:

1. That the monetary amount of civil penalties is generally low and is limited by State statute to specific amounts. Such penalties rarely exceed \$50,000, and most commonly are in the \$5,000 to \$20,000 range. Penalties in States such as Washington are developed under strict guidelines defining the severity of violations, and controlling the amount assessed.
2. That penalties are generally issued only after cooperative attempts at resolution have failed. The administrative burden of the appeals process has the tendency to keep the number of penalties down.
3. That the State's interests are in effecting Federal facility compliance and cleanup. If Federal agencies are serious about compliance with environmental requirements, few penalties will be necessary.
4. That experience has shown that it is the very fact of the penalty and the associated publicity, rather than the amount, that make penalties an effective deterrent.

THE RELATIONSHIP OF PROPOSED NATIONAL PRIORITIZATION SYSTEM AND AGREEMENTS

Another important factor in establishing effective cleanup programs is the ability to identify and prioritize actions; that is, to address the worst cleanup problems first and to approach large projects in a step-by-step fashion. We agree that this concept makes good sense, and have continually supported efforts to establish a valid prioritization system, as long as it is consistent with and supports negotiated cleanup agreements.

However, one basic tenet of such a system, and one which is too often overlooked, is that a priority system must support compliance and cleanup agreements rather than detract from their effectiveness. In fact, schedules negotiated under the context of a cleanup agreement are prioritized as technical and management staff, the regulators, and the public identify specific needs and situations at sites within each State.

I also note that Washington and other States have participated in the Department of Energy's external review group under the secretary's five-year planning process. This group was set up specifically to study available prioritization systems, and to aid the department in establishing such a system. Our experience to date has revealed that site ranking methodologies available today are, without exception, complex and highly questionable as to their ability to accurately rank site priorities. Key States have all urged caution in accepting any such system without full validation. I believe both the Department of Energy and the Department of Defense have recognized the need for caution, and are committed to working toward the implementation of a system which aids the establishment and implementation of effective, responsive, and individualized cleanup programs.

CONCLUSION

There is broad recognition that Federal facilities present some of the most challenging waste management problems in the United States, and that they are far behind the private sector in implementing effective hazardous waste compliance and cleanup agreements.

However, substantial progress toward the implementation of effective cleanup programs has resulted from the recognition that the Department of Energy and the Department of Defense are subject to the same environmental laws as the private sector. A recognition of the need to leave attitudes of the past behind, and to build commitments on the basis of full regulatory and public participation is the cornerstone of further progress and successful cleanup.

Objections to S. 596 are counterproductive to Secretary Cheney's and Admiral Watkins' environmental initiatives, to the implementation of effective cleanup programs, and to rebuilding public confidence in the Federal Government capabilities. The Department of Energy and the Department of Defense claims of sovereign immunity from State enforcement of environmental laws represent the protectionism of the past. Claims that State civil penalty authority will result in excessive fines are not borne out by experience, either in the private, or the Federal sector. Cleanup agreements must be clearly enforceable if we are to have any hope of successful implementation. Proposed prioritization systems need substantial additional development, and should not be accepted unless they support rather than mitigate cleanup agreements.

For these reasons, Governor Gardner and the National Governors' Association urge rapid passage of S. 596 in its present form.

Thank you for the opportunity to testify before the committee.

PREPARED STATEMENT OF CHRISTIAN R. HOLMES

Good Morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to be here to present the views of the U.S. Environmental Protection Agency (EPA) on S. 596 the "Federal Facilities Compliance Act of 1991." Present with me today are Gordon M. Davidson, Acting Director of the Office of Federal Facilities Enforcement and Lisa K. Friedman, associate General Counsel for the Office of Solid-Waste and Emergency Response.

INTRODUCTION

The Committee has requested that EPA examine and submit its position on S. 596. As you know, the Administration expects Federal facilities to be subject to and comply with the environmental statutes to the same extent as any private person. President Bush is committed to concerted, effective environmental action as evident

by the EPA, DOD and DOE budget commitments enacted this year and proposed next year for environmental cleanup and compliance at Federal facilities.

The Administration is doing its best, in a time of limited resources, to provide Federal facility environmental protection with budgetary increases which far exceed most other environmental programs. To this end, the President's budget provides DOD with \$2.6 billion, an increase of almost \$700 million or 34 percent above 1991, for cleanup and compliance with environmental laws. Similarly, the President's fiscal year 1992 budget request for environmental restoration and waste management at DOE facilities is \$4.2 billion, with an additional \$340 million being requested to supplement fiscal year 1991 funds.

It is the responsibility of EPA and the States to ensure that Federal facilities comply with those statutes and regulations that are applicable to their activities. To keep pace with the efforts of the other agencies' compliance and cleanup activities, the Administration's fiscal year 1992 budget requests a significant increase in EPA's resources for our Federal facility program. The fiscal year 1992 Superfund enforcement budget provides 251 workyears and \$34.8 million, an increase of 135 workyears and \$11.5 million, which is dedicated to negotiating and overseeing implementation of InterAgency Agreements (IAGs) and Section 106 Orders for cleanup of the 116 Federal Facilities National Priority List (NPL) sites and high priority non-NPL sites, which are designated to be cleaned up as required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).

The fiscal year 1992 budget for EPA's Office of Federal Facility Enforcement, Federal facility multi-media enforcement program is 32 workyears and \$1.9 million, an increase of 10 workyears and \$0.6 million. Some of the critical efforts that these resources will be used for include multi-media inspections at Federal agency facilities, enforcement actions to compel compliance, compliance tracking, policy development and implementation of OMB's circular A-106 budget and planning process.

As we stated last year and will reiterate today, we support in the purpose and objectives of this bill which would clarify that the United States should be treated the same as private persons under the Resource Conservation and Recovery Act (RCRA). This clarification, of treating Federal facilities as a "person," would, as is the case in the Clean Air Act, Clean Water Act, and Medical Waste Tracking Act, result in the waiver of sovereign immunity for Federal facilities under RCRA.

However, there are several issues I would like to discuss with you today so that you will understand our concerns about how we can proceed with a waiver that will (a) ensure that the Federal Government is treated like any other private person, and (b) will simultaneously enhance compliance by those agencies who presently have RCRA-regulated operations but with respect to some specific, unique operations, may have no prescription on how to achieve compliance. We believe you will agree that the Administration and the Congress must devise a way in which to ensure that Federal facilities are not placed in a situation wherein they are unfairly penalized for being unable to implement RCRA. We are seeking amendments that will improve the process, but unless some of our concerns are addressed, EPA will reluctantly be forced to oppose the bill. I would like to discuss these concerns later in this testimony.

Therefore, I would like to highlight for you today our Federal Facilities Enforcement Program and describe how we are proceeding to ensure compliance by Federal facilities. Following our program description, I would like to identify for the Committee several issues that are unique to the Federal Government. I will then provide you with detailed comments on S. 596 as presently drafted.

STRENGTHENING ENVIRONMENTAL PROTECTION AT FEDERAL FACILITIES

Since we last testified on this bill last year, EPA has worked diligently to strengthen our Federal Facilities Enforcement Program in order to ensure environmental protection and compliance with the law by the Federal community. I would like to discuss this program with you, as well as how we pursue enforcement actions at Federal facilities.

Ensuring compliance of all Federal agencies with environmental requirements is a challenging task due to the number and size of Federal facilities, the types and sources of contamination involved, and the potential for overlap of jurisdictional and/or statutory authority.

Elevation of the Federal Facilities Program at EPA

In order to meet this challenge EPA established the Office of Federal Facilities Enforcement (OFFE) in April 1990. This office is responsible for overseeing compliance by Federal facilities with all media (air, water, hazardous waste, etc.) program requirements as defined in the environmental statutes and regulations.

In September of 1990, EPA Administrator Reilly established a new high level position within EPA to provide direction to OFFE and national leadership to EPA's oversight of clean up and compliance at Federal facilities. This is the post in which I now serve.

Upon assuming this position, I undertook an intensive analysis of EPA's oversight responsibilities and subsequently recommended to Administrator Reilly that EPA double its oversight resources. As mentioned previously, the Administration subsequently recommended that OFFE's oversight staff, on a nationwide basis, be increased from 116 to 251 people in fiscal year 1992. Further, I am undertaking a management analysis to improve environmental protection at Federal facilities. This initiative will examine the issue of setting priorities for cleanup.

Cleanup Actions at Federal Facilities

As we study ways in which to improve environmental protection at Federal facilities, we most certainly are not standing still. We are aggressively pursuing a two-fold strategy of 1) having Federal agencies enter into both binding, enforceable cleanup and waste management agreements and 2) targeting problems which present the highest potential for the spread of contamination and taking appropriate actions. In this regard, by early fiscal year 1992, EPA plans to conclude enforceable, cleanup agreements at all 116 Federal facility sites which are on the NPL. These negotiated agreements and cleanup plans of action represent a major accomplishment. Oversight of these agreements will continue to be the major program focus for EPA—as required by statute, and as specified in the IAG, EPA must concur on or in the case of a dispute select the remedy for every NPL site.

In order to handle an increasing workload, EPA, DOD, and DOE will place greater emphasis on streamlining the response process in order to shorten the timeframes between site discovery and actual cleanup. We also need to emphasize opportunities for conducting expedited response actions. To date, EPA has supported DOD and DOE efforts to perform over 133 removal actions at their NPL facilities. As experience with the Superfund program has demonstrated, removals are an extremely cost effective tool for addressing threats and reducing long-term response program costs.

One of the most important expedited cleanup initiatives is now underway at the Hanford site. DOE, the State of Washington, and EPA recently agreed to undertake three major expedited actions to contain the spread of pollution at the Hanford facility. This action committed all three parties to initiate a long-term removal action to contain the spread of solvents which have contaminated extensive amounts of soil and groundwater; the excavation of contaminated sediments from disposal trenches; and the removal of drums of contaminated materials which were buried approximately 30 years ago. We have agreed to a similar approach at the Robins AFB NPL site.

Overall, our CERCLA response numbers at Federal facilities are quite good. There are 24 remedial actions (RAs) underway and 11 completed RAs at Federal sites. There are 34 removal actions completed, another 34 underway and 27 planned. With respect to expedited response actions, there are 28 completed actions, 42 underway and 26 planned at Federal facility sites.

As far as RCRA cleanup enforcement actions at Federal facilities, EPA has issued two unilateral 3008(h) corrective action orders and has negotiated nine corrective action orders on consent.

ENFORCEMENT AT FEDERAL FACILITIES

In the area of waste management, EPA concentrates primarily on oversight of the 348 Federal facilities which are regulated under RCRA because these facilities treat, store or dispose of hazardous waste.

Under RCRA, either the States or EPA inspect on an annual basis, as required by RCRA Section 3007, RCRA-regulated Federal facilities that treat, store or dispose (TSD) of hazardous wastes. The process of implementing RCRA is similar for Federal and private sites, there are, however, certain differences. For example, RCRA Section 3007 requires a more rigorous inspection schedule for Federal TSD facilities than for private sites. As mentioned, this Section requires a thorough annual inspection of Federal TSDs every year. RCRA requires similar inspections for private facilities no less often than every two years. However, for all land disposal facilities, whether private or Federal, the statute requires a comprehensive inspection every three years.

If violations are detected, timely and appropriate enforcement response is taken. For Federal facilities, this involves issuing a Notice of Noncompliance (NON) to the facility and attaching a draft Federal Facilities Compliance Agreement (FFCA). The

NON specifies the violations identified, describes actions necessary to bring the facility back into compliance, and sets forth timeframes for implementing the specified actions.

In many instances, subsequent negotiation of an enforceable FFCA is required following the issuance of a NON. The FFCA constitutes a formal commitment on the part of the Federal facility to perform all actions necessary to return the facility into compliance. FFCAs are enforceable by States and citizens in Federal District Court and provide for the Administrator of EPA to make the final, enforceable decision on disputes.

All enforcement actions described up to this point are the same as those used for private persons. However, the FFCA is in lieu of an administrative order on consent, which is usually negotiated at private facilities. The language of RCRA does not clearly waive sovereign immunity of Federal agencies with respect to penalties and administrative orders under Section 3008(a). Therefore, EPA uses the FFCA process to resolve compliance matters. Presently, we have 65 FFCA's in place; nine of the 17 DOE production facilities are covered by these agreements and 47 DOD facilities have FFCAs.

EPA also has been exercising its authority to issue enforcement actions against contractor-operators at government owned facilities (known as "GOCOs"). EPA can utilize its full range of enforcement authorities against contractors at government-owned facilities, and has been using these authorities to enforce RCRA requirements at GOCOs. EPA believes that where a contractor is operating a government facility and is responsible for the day-to-day management of hazardous wastes at that facility, it is entirely appropriate for EPA to hold that contractor accountable for violations of environmental law for which that contractor is responsible, and to assess appropriate penalties for those violations. EPA has taken such action at a number of Federal facilities, and is continuing to emphasize GOCO enforcement actions in its operating guidance to the EPA Regional offices.

As a result of actions undertaken as part of our Federal Facilities Enforcement Program, Federal facility compliance rates appear to be improving. OFFE has just completed its first national compilation of environmental data to develop a comprehensive picture of Federal facility compliance. We are currently reviewing the information with the EPA Regions, DOD and DOE so as to verify its accuracy. However, I would like to present some of our preliminary findings so that you can see how compliance continues to improve across the Federal sector.

Presently, there are 348 Federal treatment, storage, and disposal facilities (TSDFs) that are regulated under the RCRA program. Although the data have not been finalized, our preliminary analysis indicates that Federal facilities' overall compliance rates have improved for this set of RCRA-regulated facilities from 35 percent in fiscal year 1988 to 42 percent in fiscal year 1990. It is important to recognize that this information only applies to Class I RCRA violations at Federal facility TSDs. Class I violations cover such matters as failure to report a release of hazardous wastes and failure to conduct adequate groundwater monitoring.

Interestingly, the draft data indicate that at DOE weapons production facilities (which contain the great majority of the most complicated wastes regulated under RCRA, the mixed hazardous and radioactive wastes) from fiscal year 89 to FY90, compliance rates have improved from 25 percent to 47 percent. DOD has also seen a marked improvement in compliance from 33 percent to 42 percent.

EPA's strengthened Federal Facilities Enforcement Program has played a key role in this positive compliance trend, as well as increased attention and funding by the Federal agencies. However, these rates still reflect significant room for improvement.

Under other environmental statutes, such as the Clean Water Act and the Clean Air Act, our preliminary data indicate that Federal agency compliance rates are significantly higher and comparable to private party compliance rates. For example, between fiscal year 1988 and fiscal year 1990, compliance rates for Federal facility permit holders defined as majors under the National Pollution Discharge Elimination System ranged between 82 percent and 89 percent, as compared to non-Federal rates of 86 percent and 90 percent. Under the Clean Air Act, Federal agency compliance rates for the same period ranged between 90 percent and 98 percent, as compared to non-Federal rates of 95 percent and 99 percent. Federal facilities under these two statutes are defined as "persons" and, therefore, treated in all respects the same as private facilities.

THE ROLE OF THE STATES

The States play a critical role in our overall environmental protection efforts at Federal facilities. Since S. 596 would have the effect of broadening the States en-

forcement authority by enabling the States to fine Federal facilities for violations of RCRA, I would like to elaborate on the role of the States.

EPA and the States pursue compliance with environmental laws at Federal facilities as provided for by E.O. 12088 and the provisions contained in each environmental statute, including the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Toxic Substances Control Act, RCRA and CERCLA. The fundamental principle, as previously mentioned, is that Federal agencies must comply with all laws in the same manner as any private party. A second important point is that, other than CERCLA and TSCA, most statutes are designed to be delegated to and implemented by State regulatory agencies.

Because the programs established pursuant to the various environmental statutes have been designed to be delegated and implemented by State regulatory agencies, environmental compliance at Federal facilities is a joint prospect, shared by EPA and the States.

The responsibility for overseeing the cleanup of wastes, as well as waste management is for the most part done by the States. There are two portions of the Federal RCRA program that States are required to assume: the base program of RCRA and HSWA (the Hazardous and Solid Waste Amendments of 1984) authorization. Once States obtain authorization they operate that portion of the program in lieu of the Federal program. States assume responsibilities for several broad components of RCRA, among which are the responsibility to handle the base program which governs waste management requirements for manifests and recordkeeping and under HSWA authority the responsibility to oversee "corrective action," the clean up of wastes improperly managed or disposed.

Currently, 45 States are designated as the lead agency for the base RCRA program. The base RCRA program includes conducting inspections, issuing permits to cover most aspects of waste management, and closure of hazardous waste management units. HSWA authorization governs permitting for corrective action and activities associated with land ban regulations which prohibit land disposal of hazardous waste unless it has been treated to meet specific standards. To date, XX States have HSWA authority. RCRA

REGULATORY ISSUES

Almost all of the States which have DOE facilities either have or will soon have authority to manage both the corrective action and the mixed wastes (wastes which contain both hazardous and radioactive compounds) elements of RCRA. However, when the States assume more direct authority to enforce compliance at Federal facilities, they will also confront the same implementation issues that are currently facing EPA. Ideally, before the States assume additional enforcement authority as proposed in S. 596, the Administration and the Congress should develop methods to address several issues regarding effective enforcement. These issues include the regulation of mixed waste at DOE facilities with regard to 1) the 3004(j) RCRA statutory requirement, and 2) health and safety issues associated with management and inspections of mixed wastes; and special military wastes at DOD facilities. It is apparent that the specific regulatory regime for mixed waste and military ordnance waste needs to be addressed.

There are several key areas where we should focus our attention in order to improve the RCRA statute so that enforcement at Federal facilities can be strengthened while concurrently improving compliance within the Federal sector.

1. Recognizing certain differences between Federal and private facilities

RCRA Section 6001 requires each department, agency and instrumentality to comply with all Federal, State, interstate, and local environmental requirements "to the same extent as any person." Because RCRA 6001 does not mention Federal agencies in its definition of "person," there has been some question over the degree to which sovereign immunity has been waived for the Federal Government. Herein lies one problem, Federal agencies are required to comply with all the regulations and requirements governing the management and disposal of hazardous wastes to the same extent as a private person; but enforcement mechanisms typically utilized by EPA and the States toward "persons" to ensure compliance are limited at Federal facilities.

We thus face a double-standard between how we enforce RCRA at a Federal versus private facility. This standard, which subjects private facilities to administrative orders and penalties under RCRA, does not allow the use of these enforcement mechanisms at Federal facilities thus diminishing the regulatory agencies' credibility when enforcement actions are taken at other (private, State, local) facilities. Ad-

ditionally, these enforcement mechanisms are important to the States since they are delegated RCRA program responsibilities.

However, the requirement to comply with all RCRA requirements to the same extent as a private person does create implementation issues for Federal facilities. For some unique, mission essential operations, compliance with RCRA requirements is either currently "impossible" (i.e., 3004(j)—treatment technology for mixed waste) or could result in endangerment to human health.

2. The Regulation of Mixed Waste

Mixed wastes are wastes that contain hazardous wastes subject to RCRA regulation and radioactive wastes subject to the Atomic Energy Act (AEA). Dual regulation of mixed waste at DOE facilities involves not only EPA and DOE but also State authorities, since RCRA is implemented primarily by individual States. DOE facilities have generated and continue to generate large amounts of mixed waste which is subject to dual regulatory requirements. To date, approximately 532,000 cubic meters of mixed waste have been generated by DOE facilities. It is estimated that DOE generates approximately 52,000 cubic meters of mixed waste annually and its 17 major nuclear material or weapons production facilities.

The Committee may want to consider presently there is a problem associated with continued storage of solvent-contaminated mixed wastes subject to land ban requirements. For example, the land disposal restriction (LDR) program of RCRA prohibits the land disposal of certain wastes unless pre-treated using specified technologies or to specified treatment standards. Mixed waste contains certain hazardous wastes which are restricted from land disposal unless treated in accordance with the LDR provisions. The Administrator of EPA granted a national capacity extension for mixed waste based on a determination that there was insufficient treatment capacity. For most mixed wastes there is no existing treatment technology or method of disposal for the radioactive residue left following treatment of the hazardous component. Because there is either insufficient treatment capacity or lack of treatment technologies for mixed waste generated by DOE facilities and because RCRA section 3004(j) stipulates that these wastes can be stored only to accumulate sufficient quantities to facilitate proper treatment or recovery, many of the DOE facilities may be in violation of RCRA storage requirements. In addition there are some health and safety issues associated with RCRA requirements for waste characterization, storage and inspections. DOE will further elaborate on these issues.

3. Unique Military Wastes

Similarly, the Committee should consider recognition of DOD military essential activities that include ordnance/munitions training, handling and materiel. By definition, ordnance/munitions are dangerous and require special handling and storage.

There are other instances where the Federal community does not fit neatly into the RCRA regulatory framework. Both DOD and DOE will outline other areas for the Committee's consideration.

In summary, it may be that for those situations where there are no private sector counterparts, it is prudent to address, under a separate framework, the management of unique government wastes. Through specific language that establishes an enforceable framework for the management of these wastes, EPA and the States can more effectively utilize its enforcement capabilities to ensure compliance. We want to work with the Committee regarding how best to address these special situations. I believe my colleagues from the DOD and DOE may have some specific suggestions to offer today.

SPECIFIC COMMENTS ON S. 596

Waiver of Sovereign Immunity

S. 596 amends section 6001 of RCRA to clarify Federal facilities' obligation to comply with the requirements of RCRA and the mechanisms available to EPA, the States, and citizens to enforce compliance. It does so by expressly stating in section 6001 that the "requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines". The language used is similar to the waiver of sovereign immunity language found in other environmental laws, specifically the Clean Air Act and the Medical Waste Tracking Act.

This waiver would provide EPA with administrative compliance order authority at Federal facilities, an enforcement tool currently unavailable and would subject Federal agencies to penalties arising out of violations of RCRA. In short, the bill attempts to put federally-owned facilities on the same footing as any other facility that manages hazardous waste, whether it is a private, State, or municipal facility.

In sum we agree with the central intent of S. 596 that Federal facilities should be treated the same under RCRA as all private persons and, furthermore, that the RCRA statute treat Federal facilities the same as other key environmental laws (i.e., CAA, CWA, Medical Waste Tracking Act). However, we feel it is fundamental to the credibility of the Federal Government that the statute recognize, where appropriate, those situations where compliance is either "impossible" to achieve or where endangerment may result. *Facility Environmental Audits*

One way for Federal agencies to prevent Federal and State enforcement actions at their facilities is by performing environmental audits of their operations. Audits not only identify compliance problems, but also can be useful ways to improve operations—through waste minimization and pollution prevention. As many of you know, EPA has actively supported environmental auditing for all facilities regulated under the environmental statutes. We have published environmental auditing guidance documents designed specifically for Federal agencies, conducted training sessions and seminars on auditing, and provided technical assistance to other agencies who have implemented auditing programs. Therefore, we support the concept of facility environmental audits, however, we would like to see the requirement for an audit expanded beyond just those facilities that treat, store or dispose of hazardous waste. We would like to discuss with the Committee how best to address all environmentally significant facilities in the other media (air, water, etc.). In addition, twelve months may not be adequate for all agencies to budget and implement a comprehensive audit program.

Facility Inspections

It is important that EPA and the States have a presence at Federal facilities to ensure compliance with environmental requirements so as to protect public health and the environment. S. 596, as presently drafted, requires that EPA conduct an annual inspection for all Federal facilities regulated under the various environmental statutes. This requirement, although important to assess compliance, has major resource implications for EPA and could possibly interfere with States' obligations to conduct such inspections. Also, the requirement for groundwater monitoring inspection should be limited to those TSD facilities under RCRA.

Because EPA and the States currently conduct an annual RCRA inspection of all Federal TSD facilities, we recommend that the Committee refine the scope of this section to include an inspection of those facilities which would be considered environmentally significant under EPA's media programs. In addition, EPA must first analyze the resource implications of an annual, multi-media inspection program before we are able to support this provision. However, as I mentioned previously, with respect to resources, the Administration has been very supportive of EPA's Federal Facilities Program. We further believe that this provision should recognize that States also are authorized to perform many of these inspections.

We want to make clear that inspections, audits and assessments which may be required under this bill not be duplicated if they are required under other statutes.

CONCLUSION

In conclusion Mr. Chairman, I want to reiterate that the Administrator is committed to moving aggressively on Federal facilities compliance and cleanup. As the President's statements make clear, the Administration is placing a high priority on Federal facilities compliance with environmental requirements. We are keenly aware that without a credible process for ensuring accountability, other efforts by the Administration to secure compliance and cleanup at Federal facilities will be viewed with skepticism, and real successes will be obscured. We support in principal S. 596 and wish to work with the Committee to address the reservations we have expressed with regard to unique situations of the government.

PREPARED STATEMENT OF MARK C. SCHROEDER

Mr. Chairman and Members of the subcommittee, I appreciate the opportunity to appear today to discuss with you the Department of Energy's views on S. 596, the "Federal Facilities compliance Act of 1991." You have already heard from DOD about their concerns, and now I would like to describe a concern unique to DOE: the problem of mixed waste.

INTRODUCTION

Let me state at the outset that the Department fully supports the objectives of S. 596: to bring Federal facilities into compliance with applicable Federal and State

environmental laws—and particularly the Resource conservation and Recovery Act (or RCRA). I assure you that bringing the Department's facilities into compliance with all applicable environmental laws is one of Admiral Watkins' highest priorities. Our Fiscal Year 1992 budget request for environmental restoration and waste management activities in the DOE complex is 309 above fiscal year 1991. In fiscal year 1991 and 1992 we will spend a billion dollars in each year on compliance activities alone.

However, as you are aware the Administration expressed serious concerns about this bill during the last Congress. We continue to believe that these concerns must be addressed, or we will be forced to continue our opposition to this bill.

Many of the problems that the Department now faces regarding waste management are a result of the Department's late start in recognizing the applicability of RCRA to its defense facilities and of the fact that radioactive mixed waste was not specifically addressed in the existing legislation. Radioactive mixed waste is waste that has a radioactive component and a hazardous component, as defined under RCRA. The law needs to be significantly modified to recognize that radioactive mixed waste presents unique problems that require unique regulatory treatment.

In 1980, the Department took the position that its Atomic Energy Act activities were exempt from RCRA, based on section 1006(a) of RCRA. Accordingly, the Department did not participate extensively in the legislative process leading to the 1984 RCRA Amendments or in many of the EPA's RCRA rulemaking proceedings. Those amendments established many critical requirements that now have unplanned impacts on radioactive mixed waste. The waste management implications of the radiological characteristics of radioactive mixed waste were not considered by Congress or the EPA in the development of RCRA's requirements.

It was not until 1987, when the department published its final "By-Product Material" rule, that the legal uncertainty regarding RCRA's applicability to radioactive mixed waste was resolved. This regulation provided that RCRA would regulate the hazardous component of radioactive mixed waste, and the Atomic Energy Act would regulate the radioactive component. Adoption of the By-Product rule, however, did not end the Department's problems concerning compliance with RCRA's requirements.

Compliance with many of RCRA's requirements in their current form would result in potential increased occupational radiation exposures. This includes requirement: for waste characterization, inspections, storage, and closure. Though we have not prepared comprehensive data regarding the occupational radiation exposure that would occur as a result of literal compliance with all of RCRA's waste management requirements for radioactive mixed waste at all DOE sites, information illustrating many such situations is being prepared.

RCRA land disposal restrictions (LDRs) included in the 1984 RCRA amendments prohibit land disposal of restricted hazardous wastes unless the wastes have been treated. Although commercial treatment capacity is available for any non-radioactive LDR wastes, these restrictions are problematic for radioactive mixed waste. Treatment technologies and/or capacity do not exist for most mixed waste types. Although the LDR storage prohibition of untreated waste precludes the only other waste management option for the Department's massive amounts of radioactive mixed waste, the Department has no alternative but to store large quantities of restricted radioactive mixed waste until treatment technologies are developed and permitted. S. 596 would subject the Department to potential fines for this storage even though there may not be near-term solutions to the problem nor any health threats posed by this storage.

It is clearly time to take a fresh look at radioactive mixed waste and to provide RCRA regulatory requirements appropriate to the hazards associated with both its hazardous and radioactive components. Until this happens, the Department will continue to experience legal and technical difficulties trying to comply with RCRA's requirements. This is particularly true, for example, for violations that arise due to unavoidable storage of land disposal restricted radioactive mixed waste or due to the unavailability of radioactive mixed waste treatment technologies. The Department believes that we must acknowledge that RCRA and its regulations were not written with mixed waste requirements in mind, and that we should not attempt any longer to "force fit" compliance when the regulations are unworkable. In the field of purely hazardous waste, i.e., non-radioactive hazardous waste, we can and should comply with RCRA's requirements, and I want to emphasize that this is not the main source of our compliance problems.

The Department believes that passage of S. 596, without addressing at the same time several fundamental problems with current RCRA regulations, would not aid efforts to bring Department of Energy facilities into compliance with RCRA. We

are, however, willing to discuss with the subcommittee's members and staff specific changes to the bill which we believe are needed to harmonize the RCRA and radioactive, mixed waste management regulatory regimes. With such appropriate changes, we are prepared to re-examine our opposition to this bill.

Beyond expressing the Department's disagreement with expanding RCRA's waiver of sovereign immunity without resolving the many problems brought to your attention, I would also like to comment briefly regarding S. 596's other provisions:

First, the Department supports allowing Federal agencies to provide legal representation for, or to reimburse legal expenses of, any employee involved in a State or Federal criminal proceeding under circumstances described in the bill. It is not fair, nor is it conducive to improved compliance efforts, for a Federal employee acting in good faith to labor under the fear that his life savings may be placed in jeopardy for matters in which the employee's conduct is ultimately found to be without fault. We appreciate the committee's recognition of, and concern for, such situations.

Second, the Department believes that a requirement for Federal agencies to reimburse the EPA for its costs incurred in conducting annual inspections at our facilities is duplicative and an inefficient use of the taxpayers' money. We recognize that the EPA's oversight activities at DOE facilities need to be adequately funded, and would support its efforts to obtain necessary resources through the normal budget process. The Department did so during this past budget cycle. To require the Department to pay for the EPA to conduct its legally required activities runs contrary to the normal budget process and would result in taking needed funds from the Department's environmental restoration and waste management efforts.

Third, the Department believes that any fines to be assessed against it by a State should be limited to use by that State for environmentally beneficial purposes at the facility against which the fine is assessed. As any such fine would come out of the environmental restoration and waste management budget, it should at least be utilized at the site which is the subject of the State's concern.

Fourth, the Department believes that the "tiger team" reviews previously conducted by the Department at its facilities should satisfy any requirement for additional assessments envisioned under the bill.

CONCLUSION

In summary, Mr. Chairman, the issue of fines and penalties under RCRA is integrally related to various real and serious problems arising from a regulatory scheme that fails to recognize the regulatory issues presented by radioactive mixed waste. The Department is trying very hard to achieve full compliance with RCRA. If we are to achieve full compliance, we must have a regulatory framework that takes those issues into account. We need cooperative involvement and oversight by the EPA and the States for our efforts to succeed without that oversight and involvement, our efforts will lose credibility, and we will not succeed in regaining the public trust. We look forward to working with the Committee on changes to the bill.

Mr. Chairman, that concludes my prepared statement. I am prepared to answer questions from the subcommittee.

PREPARED STATEMENT OF THOMAS E. BACA

Mr. Chairman and members of the panel:

INTRODUCTION

I am pleased to appear before you to discuss the Department of Defense's (DoD's) views on S. 596, "The Federal Facility Compliance Act of 1991." The DoD is committed to environmental compliance. Last September, Secretary Cheney emphasized that "Defense and the Environment is not an either/or proposition." He challenged and tasked the Department to build an environmental ethic into the daily business of Defense. On that occasion, Secretary Cheney was hosting a gathering of over 500 people representing local communities, State governments, environmental and business groups, Congress, the Environmental Protection Agency (EPA), the Council on Environmental Quality, and DoD. I reiterate that commitment today and I believe we are making significant progress in living up to Secretary Cheney's vision. As only one measure, we have more than doubled our environmentally related funding in the last three years. Our cleanup program, for example, has increased from around \$500 million in fiscal year 89 to over \$1 billion this year; the fiscal year 1992 budget requests \$1.25 billion. Our compliance program has demonstrated similar growth with our fiscal year 1992 request standing at over \$1.4 billion.

I want to emphasize Mr. Chairman, that we are already subject to Federal and State environmental law. That goes for hazardous waste law, the focus of S. 596. There seems to be an impression that we are not, but that simply isn't so. The primary effect of S. 596 is to make Federal facilities subject to assessment of civil penalties by State regulatory agencies for violations of the Resource Conservation and Recovery Act (RCRA)—to make our facilities like the private sector in this regard. We agree with the goal of this bill—to achieve better compliance. DoD also does not shrink from being treated like private facilities; in fact, we do not believe that S. 596 goes nearly far enough in this regard. On the other hand, we continue to have concerns about the provisions of S. 596. These concerns were expressed during consideration of this bill by the previous Congress. We urge the Congress to address our following concerns so that we can be in a position to reconsider our opposition to this bill.

We believe S. 596 could be a portion of a comprehensive program designed to protect our nation's environment through improved compliance. S. 596 clarifies and refines the administrative authority of the States vis-a-vis the Federal Government. We believe that some improvements need to be incorporated into S. 596 while others can be more appropriately addressed in other ways at a later time. I emphasize, however, that we should address the overall goal of Federal facility environmental improvement as part of a single strategy that addresses this bill and other related areas.

In the past, when we talked about Federal agency compliance with environmental laws, we focused totally on fines and penalties. The heated discussions over these sanctions eclipsed the debate and prevented fuller consideration of other viable and progressive solutions to and improvement in Federal agency compliance with environmental laws. We believe that these other factors, not just administrative orders, fines and penalties, are essential components of a foundation that would support our mutual goal—successful and sustainable compliance.

COMMENTS ON S. 596

First, we need a clear hierarchy of authority over our compliance actions. When I talk about compliance actions here, I am not so much referring to routine RCRA waste management activities, but rather the cleanup of sites at RCRA facilities. Quite simply, Mr. Chairman, there is tremendous ambiguity in the laws over which regulatory agencies have primacy at Federal facility cleanup sites when RCRA, CERCLA, and State hazardous waste laws which has lead to confusion, delay, duplication and added cost.¹ We are convinced this situation does not exist to nearly the same extent for private facilities. This is a major concern which we would like to work with the committee to resolve.

Second, we would like to bring to your attention an area we feel particularly strongly about from a RCRA enforcement perspective. DoD conducts a number of military essential activities and produces, and eventually disposes of, military essential equipment and materiel. Such activities and materials include ordnance/munitions training, handling and disposal. By nature, ordnance/munitions are inherently unstable and require special handling and storage and training in their use. Procedures regarding the handling of these items have existed for years and are constantly revised and updated as we develop new weapons and systems. DoD is concerned about the application of RCRA storage, treatment and disposal standards to some aspects of these unique items and systems. These items simply do not fit neatly into the RCRA scheme for waste management. The threats they pose are more immediate, acute and directed at people, rather than the environment. Ordnance and munitions related activities may not always be "popular," yet from a national security and military readiness perspective they are essential to our mission. We simply have to recognize that defense of our Nation and of freedom around the world, demands that we conduct certain activities and we view protection of the environment as part of those activities. We will do all that we can to live up to this declaration. However, we fear that a disproportionate emphasis on some environmental factors will force us to less safe activities and eventually restrict the continued use of facilities and operations that are essential to the safety, training and continued readiness of our military personnel. Accordingly, we recommend that the Committee adopt a

¹ This problem arises because Federal facility sites are not treated the same as private sector sites. First, Federal facility sites are not, like their private sector counterparts, deferred from listing on the NPL. Second, again, unlike the private sector, all Federal facility sites whether or not they are on the NPL or considered CERCLA removal actions, are all covered by the CERCLA cleanup umbrella (CERCLA, Section 120).

provision similar in concept to that which exists in the Clean Air Act, which allows the President to create a separate body of regulations governing these military essential activities. Once established, the States could enforce these regulations just as in other areas, including authority to impose penalties.

Using this same military essential principle, I would like to bring to your attention a third matter regarding the inconsistency between how privately held product-carrying vessels and military vessels are treated under RCRA. This inconsistency has led to the treatment of a military vessel as a RCRA-regulated unit and as such potentially subject to comprehensive RCRA waste handling procedures. Until recently, DoD has assumed, like private vessels, that the waste will be handled pursuant to RCRA procedures once the waste is off-loaded at the port. Let me assure you that stringent procedures apply to these materials on board vessels, even though our ships are designed for war fighting purposes, with little room to spare. We have to make very efficient use of space and build in to the design of our ships safety procedures to protect them from threats more real than hazardous waste. Because of the close quarters, there is a built in incentive to manage these wastes using safe, protective procedures so that our sailors are not at risk. Military vessels like private product vessels should not be considered RCRA regulated entities.

Our fourth issue is employee liability. We appreciate the Committee's efforts to clarify that Federal employees cannot be held personally liable for civil penalties. We are in agreement with the intent of the legislation to provide Federal employees with protection from civil liability, but do have some concerns that the waiver of sovereign immunity is technically broader than the protection afforded. I will be glad to provide our technical comments for the record. In addition, S. 596 added a provision that had not been included in prior versions of this bill that would authorize the head of the Federal agency to represent or reimburse employees in certain cases. These two clarifications play a significant role in our ability to be able to hire and retain qualified environmental managers. This is necessary if we are to find and keep smart, environmentally knowledgeable people to move us further towards our goal of sustainable compliance.

Our fifth issue is one which we believe will benefit ourselves as well as the States. DoD owns a large number of facilities and our compliance and cleanup efforts generate enough work that it can exceed the States' processing ability. As a result, our actions can be held up. We believe language which would clarify when it is appropriate for Federal agencies to pay fees to State agencies to support their ability to review our permits and studies is needed. Existing statutory language and judicial holdings can be interpreted as being restrictive and, as a result makes it potentially more difficult for us to pay State fees. We want to remove whatever ambiguity may be present in existing law. In short, we again believe we should be treated like the municipalities in this regard.

Sixth, we are concerned about the inclusion of language in S. 596 requiring Federal agencies to perform assessments of the releases of hazardous substances from each solid waste management unit. This provision creates a third duplicative requirement to assess releases. We are already required to perform such assessments at all of our installations under CERCLA Section 120, as well as our own authorizing legislation (Title 10 U.S.C. 2701 et seq.). In addition, RCRA and its implementing regulations have established a comprehensive scheme to assess all such releases for our RCRA permitted installations. Indeed, our current report to Congress on our cleanup efforts States that we have identified and assessed over 17,000 potentially contaminated sites at more than 1,800 installations. We have looked long and hard for our sites. The Department fears that such a provision will result in a third wave of duplicative evaluations that serve only to keep us in the "study phase" and prevent us from moving forward on the substantial and substantive work we have already done at thousands of our sites. Let me say we are already experiencing such problems with duplicative requirements as referred to above in my discussion on the RCRA, CERCLA, State law overlap matter. No one is making the private sector go back and repeat work over and over again. We, therefore, request that the Committee modify this provision to ensure that it does not apply where equivalent CERCLA or RCRA assessments have already been done under proper oversight.

Our next issue relates to the matter of reimbursing EPA for inspections of our facilities. DoD does not support this provision. We believe it is counter to the principle that each department and agency create a budget based on its areas of responsibilities. We should not adopt procedures which will complicate—not simplify—an already complex budget process. I might add, however, that DoD has strongly supported EPA's need for resources within the Administration and was pleased to see that additional resources were provided.

Finally, DoD would request that the Congress amend the bill to rectify a statutory disparity between how federally owned and publicly owned waste water treatment works are treated. This inconsistency translates into millions of dollars in actions that we and the regulatory agencies recognize are unnecessary from an environmental perspective. We are seeking amendments only to rectify this inconsistency for our treatment works that primarily manage domestic or sanitary wastes, similar to wastes of municipalities—not our industrial wastes.

OTHER COMPLIANCE RELATED CONCERNS

The Department has other concerns directly related to our fundamental goal of improved Federal facility compliance. We do not believe these other matters should be incorporated into S. 596, but should be made part of a more comprehensive RCRA reauthorization bill. We see these issues as part of the overall strategy to improve Federal facility environmental performance. Our primary reason for refraining from pushing for inclusion of these in S. 596 is because these issues are applicable to the broader regulated community and are not issues uniquely encountered by Federal agencies.

First, we have initiated self-improvement audits as part of our ongoing compliance maintenance efforts. For these audits to produce beneficial results they must be thorough and honest. We are concerned that our audit program will become the basis for State civil penalties and other suits, thereby creating a disincentive to our audit program. We recognize that protecting internal audits from disclosure by designating them as "privileged information" is not the solution. We believe, however, that in recognition of our efforts to discover and prevent noncompliance through voluntary self audits, and our obligation to disclose audit reports, judgment and restraint should be exercised before initiating enforcement actions when we have made good faith efforts to correct the noncompliance.

Second, like the private sector, DoD also supports the idea of adopting the conditional remedies approach as proposed by EPA in the draft RCRA Corrective Action Regulations. This approach allows for final permanent remedies to be postponed, under certain conditions, so that funds can be expended on the more immediate, high risk problems. DoD, like the private sector, sees wisdom in this approach. For the private sector, it allows them to continue to operate, to make the money needed to clean up the release. For us, since there is no guarantee that we will always receive sufficient funds to pay for the simultaneous cleanup of all our facilities, it allows us to focus on the worst sites first nationally.

We are aware of the States and environmental organizations' objections to the concept as proposed in the regulation—that it is too open-ended and could allow for indefinite deferral of cleanups. For example, some could interpret the concept as requiring no cleanup at a facility as long as contamination did not migrate off the property. We share those concerns, but rather than discarding the entire concept, we recommend the approach establish timeframes to close the door on indefinite postponement of full remediation. I can assure you that the Department is committed to cleaning up our sites; we have spent over \$3.5 billion dollars to date and are budgeting over \$1 billion dollars per year to do so. And, we are doing so at all our facilities not just the very few where contamination has migrated across our fence lines.

A third issue is less of a compliance matter and more of an issue of consistency among statutes. RCRA, unlike CERCLA, currently contains no authorization to consider cost-effectiveness in the selection of a cleanup remedy. Cost should be an element in all cleanups. If cost is not made a factor, it is theoretically possible to require exhuming an entire 40-acre landfill, transporting it hundreds of miles to another locale to reduce the risk a minuscule amount that no one can measure, let alone comprehend. Such costs, however, would far exceed any reasonable benefit to society. We see reason in the fact that the Congress chose in 1980 to include cost-effectiveness when it passed the Superfund cleanup law and believe such wisdom should apply to the RCRA cleanup arena also.

One remaining departmental concern relates to the potential budget implications. The States have come forward and stated they will be reasonable in assessing penalties—we believe them. As we in the executive and legislative branches look to implement this legislation, we should also look to implement mechanisms for fiscal accountability.

CONCLUSION

Let me conclude by saying that I am very concerned about DoD's compliance with hazardous waste and other environmental laws. I am aware of EPA's compliance

figures. While I have concerns about the relative accuracy of the figures, concerns which EPA is aware of and making every effort to address, the fact is the data show that our performance is not good. Even if the compliance data would show we exceed private sector performance, we would not rest on our laurels. We have to keep working away at the problem and continue to identify the root causes for less than full compliance with environmental laws and implement solutions. This is my goal and this goal is what motivates me—not, the avoidance of fines and penalties. Compliance is important to all the stakeholders. All I want to say is that there have to be other efforts made, beyond fines and penalties, to achieve fully satisfactory environmental performance by Federal agencies.

PREPARED STATEMENT OF SHIRA A. FLAX

On behalf of the Sierra Club's 650,000 members, thank you for the opportunity to testify in support of the Federal Facilities Compliance Act of 1991, S. 596, introduced by Majority Leader George Mitchell and co-sponsored by 27 Senators.

Sierra Club thanks the Committee for unanimously reporting out the Federal Facilities Compliance Act in the last Congress. We urge the Committee to soon do the same this session.

Swift enactment of the Federal Facilities Compliance Act is one of Sierra Club's top legislative priorities in 1991. We urge the Environment and Public Works Committee, the Senate and Congress to pass S. 596 as a freestanding bill, and not to wait for the re-authorization of the Resource Conservation & Recovery Act (RCRA).

Strong enforcement of our environmental laws is essential to protect public health and the environment. Congress can pass environmental protection laws, but they are nothing more than paper promises if the Environmental Protection Agency (EPA) and the States cannot fully enforce them. As long as States and EPA cannot use the full range of enforcement tools, there is little incentive for Federal facilities to comply with the law, and, consequently, responsibly handle their wastes.

Until S. 596 is enacted, an intolerable double standard will continue to exist between Federal, municipal and private facilities. Industry and municipalities have to "face the music" when they violate RCRA. So should Federal facilities.

ENACTMENT OF S. 596 IS NEEDED NOW MORE THAN EVER

Sierra Club believes that prompt enactment of S. 596 is needed now more than ever, because the Department of Energy (DOE) continues to thumb its nose at EPA and State enforcement efforts. Since the Federal Facilities Compliance Act was reported out of the Committee last Congress, the Department of Energy has broken several compliance agreements. This past fall, EPA Region V began fining DOE because it violated the terms of a cleanup agreement it signed at the Feed Materials Production Plant in Fernald, Ohio. In January, DOE reneged on a key RCRA commitment it made in an agreement it signed with Washington State and EPA Region X regarding the Hanford Reservation in Washington State (the Hanford Tri-Party Agreement).

DOE's behavior at Fernald and Hanford shows that it complies with the law only when it wants to, because there is no threat of punishment for violations. As long as DOE flaunts hazardous waste laws with impunity, citizens living near its facilities could be exposed to dangerous amounts of hazardous wastes.

THE DEPARTMENT OF ENERGY BREAKS THE FERNALD AGREEMENT

The community adjacent to the DOE plant in Fernald, Ohio wants DOE to stop radon emissions from silos located inside the facility. The silos store radioactive/hazardous waste generated in the 1940's by the Manhattan Project. The silos are the Nation's largest emitter of radon. The health of the community near Fernald is threatened until that radioactive waste is stabilized, the silos safely closed and the radon emissions stop.

In January 1990, DOE signed a Fernald cleanup agreement with EPA Region V. By signing the agreement, it made a commitment to clean up the silos and end the radon emissions by a certain date. DOE agreed to carefully and thoroughly measure the extent of the radon emissions from the silos. The Fernald agreement also required DOE to adequately investigate whether radioactive waste is leaking from the silos into soil. Soil beneath the silos are on top of groundwater that supplies drinking water wells.

In September 1990, EPA Region V informed DOE that its measurements were neither careful nor thorough. DOE was taking its radon emissions readings from obsolete detectors placed at the plant fence, not at the source of pollution (the silos).

EPA asked DOE to install state-of-the-art radon detectors on the silos. EPA also asked DOE to sample the soil beneath the silos for contamination. In November, the DOE Fernald Plant cleanup manager informed EPA that there was no reason to take new soil samples.

DOE did not take new soil samples, nor did it install modern radon detectors. Both actions clearly violated the terms of the Fernald agreement. Instead of allowing DOE to continue to violate the Fernald agreement, Region V exercised its legal authority under Comprehensive Emergency Response and Liability Act (known as Superfund), by issuing stipulated penalties. In December, Region V informed the DOE Fernald management that it will continue to levy stipulated penalties until DOE takes new samples, and installs modern detection devices.

We agree with EPA that nothing short of fines will force DOE to stop the radon emissions at Fernald.

DOE BREAKS THE HANFORD TRI-PARTY AGREEMENT

The Hanford Reservation is in eastern Washington State. Eastern Washington is a major agricultural production area. Eastern Washington State is bordered by the Columbia River which is extensively used for boating, sport fishing and recreation by the citizens of Washington and Oregon. The Columbia River is, also, a source of food for the Yakima Indians of the Northwest.

Plutonium used in atomic bombs was produced at the Hanford Reservation. The nuclear and chemical industrial processes used to prepare one batch of plutonium generate millions of gallons of radioactively hazardous waste. For years, millions of gallons of this waste was dumped directly into the soil at Hanford. Hazardous material too radioactively "hot" to dump into the soil was stored in one-million-gallon tanks. These tanks are not safe storage facilities because they chronically leak. For the past fifty years the disposal practice-of-choice for radioactively contaminated hazardous waste at Hanford was either storing it in leaking tanks or deliberately dumping it into the environment.

As described by the General Accounting Office (GAO), contamination of the Hanford environment is so extensive that the amount of liquid dumped at Hanford could fill a lake the size of Manhattan. Hanford has more Superfund sites than the entire State of New Jersey. As recently described by the Office of Technology Assessment (OTA), if the amount of soil contaminated at Hanford was spread out, it would cover the entire District of Columbia to the height of Capitol Hill.

In May 1989, the Department of Energy signed an agreement with Washington State and EPA Region X (the Hanford Tri-Party Agreement) to bring Hanford into compliance with RCRA and Superfund. The objective of the TriParty Agreement was to restore the contaminated land at Hanford so that in thirty years it would resemble neighboring farmland. All of the tanks on the Hanford Reservation must be safely closed by a certain date to meet this objective.

In the past year, citizens of Washington State learned that the double walled tanks, the storage facilities for radioactively contaminated hazardous waste, could explode. If there is an explosion, Hanford workers could receive a potentially lethal dose of high level radiation. Even people miles away from the explosion could receive a severe dose of radiation.

Both these and the single walled tanks contaminate the environment by leaking radioactively hazardous liquid into soil that is over groundwater. This groundwater flows into the Columbia River. Radioactive elements leaked from the tanks has been detected in the Columbia River.

The RCRA section of the Hanford Tri-Party Agreement called for the Hanford tanks to be safely closed by a certain date. The double walled tank's wastes are to be stabilized by enclosure in glass (vitrification). Vitrification of these wastes must begin in 1999 if the double walled tanks are to be safely closed in thirty years. The vitrification plant construction must begin in 1991 for the plant to be operational in 1999.

A year after the signing of the Hanford Tri-Party Agreement, DOE began indicating that it could not meet the 1991 construction-start deadline. In October 1990, the State asked DOE to follow the procedures written into the Hanford Tri-Party Agreement that govern schedule extensions. The schedule extension provision directs Washington State to change a deadline if DOE can prove there are technical reasons to do so.

Rather than comply with the State's request to follow the agreed-upon extension procedure, Secretary of Energy James D. Watkins informed Governor Booth Gardner in January that the 1991 construction-start deadline will not be met. Subsequently, President Bush's Congressional Budget Request did not contain enough money to begin constructing the vitrification plant in 1991.

In February, DOE finally submitted to Washington State its technical justifications for seeking an extension—after it informed the State that the vitrification construction-start deadline would not be met. Furthermore, DOE asked that all RCRA compliance deadlines—not just the vitrification schedules—be lengthened.

On April 8th, Washington State notified DOE that it will only grant one schedule extension at this time. The extension for the construction-start of the vitrification plant, and for most of other RCRA compliance deadlines, were not granted by the State.

Because Washington State does not have civil penalty authority over Federal facilities, it cannot easily enforce its decision. Without civil penalty authority, there is little to motivate DOE to abide by Washington State's decision. There is no meaningful recourse available to the State if DOE begins missing routine deadlines.

If the polluter in question was a business or municipality in Washington, the State could use its administrative civil penalty authority to enforce its decision. Washington State, like all other States, can easily enforce the law when a business or city violates RCRA. Until the Federal Facilities Compliance Act of 1991, S. 596, is enacted, neither the States of EPA can easily enforce RCRA at Federal facilities.

THERE IS NO SUBSTITUTE FOR DETERRENCE

EPA's decision at Fernald and Washington State's current predicament at Hanford show that regulators rely on the threat of penalties to force compliance from recalcitrant polluters. Nothing short of the threat of punishment motivates compliance with the law, and deters violations.

Today's hearing is taking place the day after our tax returns are due. If the Internal Revenue Service could not fine people when they did not pay their taxes, many people simply would not pay. Similarly Federal facilities have little incentive to comply if there is no threat of punishment for violating RCRA.

The Federal Facilities Compliance Act of 1991, S. 596, gives EPA and the States the very enforcement tool they need to enforce an agreement, and to motivate compliance with RCRA requirements by Federal facilities.

SEND A CLEAR SIGNAL.

Sierra Club asks Congress to send a clear signal to the Federal Government that they have to comply with the hazardous waste law. The Federal Facilities Compliance Act of 1991, S. 596, is a clear and decisive signal. Sierra Club urges the Senate Environment and Public Works Committee to promptly unanimously report out S. 596. We urge you to report the bill as offered by Senator George Mitchell, and to oppose any weakening amendments.

Thank you.



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HeartOfAmericaNorthwest

"Advancing our region's quality of life"

"The Federal Facility Compliance Act of 1991" S. 596

Testimony of Heart of America Northwest and Legal Advocates for Washington

Before the U.S. Senate Committee
on Environment and Public Works

April 16, 1991

Testimony Presented by
Gerald M. Pollet,
Executive Director & Attorney

SUMMARY: Goals of accountability, legal compliance and public confidence in the clean-up of the contaminated legacy of the U.S. Department of Energy's weapons production sites are seriously undermined by the Department of Energy's claimed immunity from fines and penalties for violations of the Resource Conservation and Recovery Act and Solid Waste Disposal Act, *42 USC 6902 et seq.*

The highly touted "Clean-Up Agreements" reached between USDOE and the states and EPA are being rendered meaningless by USDOE's failure to request sufficient funds to meet the legally binding timelines and milestones of those Agreements and Consent Orders. At Hanford alone, the USDOE's FY 1992 Congressional Budget Request falls \$387 million short of USDOE's own Five Year Plan "Requirements Level" for Hanford clean-up and environmental compliance obligations for FY 1992.

USDOE's immunity from fines and penalties for on-going serious violations of RCRA and immunity from any penalty for breaching Hanford Clean-Up Agreement timelines and milestones indisputably results in USDOE budget priorities and funding requests that breach the USDOE's legal and ethical obligations to comply with the law.

Testimony of Gerald Pollet,
Heart of America Northwest &
Legal Advocates for Washington

S. 596

The Federal Facility Compliance Act of 1991

Thank you Mr. Chairman and Members of the Senate Environment and Public Works' Environmental Subcommittee for this opportunity to testify on behalf of our organization's 16,000 members and Board of Directors. In our home state of Washington, on the shores of the mighty Columbia River, sits what is likely the most contaminated land area and the most dangerous threats of catastrophic release of radioactive and hazardous wastes on our continent: the U.S. Department of Energy's 570 square mile Hanford Nuclear Reservation.

We are here today because you have before you in S. 596, the "Federal Facility Compliance Act of 1991," a piece of legislation offered by Senator Mitchell and 23 Members, including Mr. Adams of Washington, that is vital to the goal of this nation to clean-up Hanford and other U.S. Department of Energy (USDOE) wastes by the year 2019. We do not believe that this goal will be accomplished without passage of S. 596.

S. 596 is vital to the goals of environmental compliance and a thirty year clean-up because the USDOE has not evidenced any intent of fulfilling its obligations to seek the funding necessary to meet timelines and milestones under clean-up agreements with the states and EPA. This is not a dispute over small amounts of funding or whether some jobs can be done for less money (in fact, as an organization with roots in the Northwest business community, we are certain that DOE's costs are too high). The priority of clean-up and environmental compliance within USDOE is the question. The evidence of USDOE's low prioritization and lack of a good faith intent to meet its clean-up agreement timelines is discussed below. Without S. 596, that low level of priority will not change.

Apparently, as we will detail herein, USDOE lacks sufficient incentive to comply with the Federal Resource Conservation and Recovery Act and the Solid Waste Disposal Act (42 USC 6901 et seq.) because the agency lacks both the internal commitment to the environmental goals

embodied in the environmental laws passed by the Congress and any fear of penalties or fines for failing to comply.

As we will explain, the USDOE is - just two years into Secretary Watkins' commitment to comply with all environmental laws and clean-up agreements, and to complete environmental restoration of the USDOE facilities by 2019 - evidencing an intent of breaching its clean-up obligations and is far off course in regard to a thirty year clean-up timeline.

The USDOE's degree of violation of RCRA is unprecedented in this nation. As explained below, the USDOE's violations of RCRA at Hanford are not simply having disposed of wastes improperly in the past with a commitment to clean them up now, but, rather, a clear pattern of continuing blatant disregard for the law - resulting in continued illegal discharges and imminent and substantial threats of potentially catastrophic releases of wastes (i.e., the potential for High-Level Nuclear Waste Tanks to explode and continuing leaks from those tanks).

The public of Washington State is greatly concerned about the Department of Energy's continuing opposition to S. 596 (and also to Senator Adams' 1990 Federal Nuclear Facility Environmental Response Fund Act). Over and over again, at public hearings on the Hanford Clean-Up Five Year Plan and the Programmatic Environmental Impact Statement on Clean-Up, citizens testified that the DOE's claims of a commitment to a new culture of compliance with environmental laws rings hollow and utterly false given the Department's opposition to S. 596. Compliance without accountability is not compliance. A commitment to comply with RCRA without meeting the same oversight and penalties imposed on all other violators is not compliance at all.

*The DOE's Commitment To Comply Does Not Extend To
the Department's Budget Prioritization of Compliance
With RCRA and Clean-Up Agreements:
Inspections, Penalties and Fines Pursuant to a
Waiver of Sovereign Immunity Are Needed*

The best evidence of intent is actual actions. In the case of the U.S. Department of Energy's massive violations of the federal hazardous waste law, RCRA (the Resource Conservation and Recovery Act) and

state hazardous waste laws (e.g., Washington Dangerous Waste Law RCW chapter 70.105) the most recent actions of the Department demonstrate a blatant intent to breach tri-party Clean-Up Agreements and consent orders aimed at the 30 year clean-up goal and the stemming of on-going environmental contamination. The budget submission for FY 1992, and the priorities of the Department within that request, demonstrate a disregard for the moral, ethical and legal obligations of the Department pursuant to such agreements, consent orders and various environmental laws.

The Department of Energy's FY 1992 Budget Request falls a shocking \$1.76 Billion short of the "Requirements Level" in the Department's own Five Year Plan for Clean-Up, which is supposed to provide a blueprint for reaching the thirty year clean-up goal.

Without fear of any penalty or fines for violating RCRA and its clean-up agreements and consent orders, the Department's top brass and bureaucracy apparently have no incentive and NO INTENT to seek the funding needed to comply with those obligations.

There is no fear of embarrassment on the part of the DOE, as the DOE need not fear that EPA or the states will take them to court for violations - so long as a majority of federal court circuits hold that DOE is immune from liability for violations of RCRA (pursuant to which the bulk of the agreements and consent orders are entered into).

The evidence of intent to comply or not to comply is indisputably presented to the Senate and public in the Department's FY 1992 Congressional Budget Request. At Hanford alone, the shortfall between that request and the Hanford Clean-Up Five Year Plan is \$387.2 million. *See Table 2.*

In real terms, the Department of Energy's FY 1992 Budget Request represents a very real set of breaches of the Hanford Clean-Up Agreement and Consent Order. The shortfall in the "Corrective Activities" budget (shortfall of \$13.845 million from the activity data sheets; *See Tables 2 & 7*) means that the installation of groundwater monitoring wells needed to detect the migration of leaks from Hanford's Single Shell Tanks of High-Level Nuclear Waste and migration of wastes from other sites will be delayed. USDOE is already in long-standing violation of the RCRA requirements for the installation of groundwater monitoring wells. The timeline for their installation in the Hanford Clean-Up Agreement was

extremely generous for a liable party who denied that its wastes were in the groundwater or migrating to the Columbia River until evidence was uncovered by the General Accounting Office (GAO) and others.

The reality of the gap between DOE's budget commitment to environmental restoration and its legal obligations is more shocking still. As detailed in TABLES 3 and 5, the shortfall of \$77,597 million means that specific high priority contaminated soil and facility site investigations and clean-up work plans will not occur. Each delay breeds further delay down the road.

How can the Department of Energy ignore these fundamental legal obligations in its own clean-up agreements?

In submitting to Congress the Department's FY 1992 Congressional Budget Request, the Department was well aware of the impacts of the Department's internal prioritization on the USDOE's ability to meet legal obligations under clean-up agreements and consent orders. See *The Spokesman Review* article, "DOE Admits Clean-Up Funds Short," March 5, 1991. Attached.

In fact, the Department made its cuts between Defense Programs and Clean-Up cognizant of the fact that the disproportionate cutting of clean-up funds by a 3:1 ratio would lead to breaches of federal and state environmental laws, including obligations under RCRA and clean-up agreements/consent orders. The Department's official decision was to seek renegotiation of those obligations and timelines under the guise of "technical" reasons for seeking delays - knowing full well that the delays were budgetary and had little technical merit.

Most bureaucracies are driven by fear of embarrassment or penalty when resistant to the imposition of new environmental responsibilities. The DOE's intent to breach the law and its clean-up agreements is clear.

Unless S. 596 becomes law, DOE will have no such fear.

Permit me a moment to tell a relevant story. I serve on a Toxics Advisory Group to Seattle City Light, the Northwest's largest public utility. Much of the group's, and the utility's, attention has been given to compliance with RCRA. The utility has moved promptly with capital projects to meet RCRA waste storage requirements, etc. Recently, we were reviewing another of the utility's toxics/hazardous substance programs and discovered that the utility was 17 years out of compliance with federal

regulations. Further, we were disturbed that the utility was delaying capital expenditures to bring itself into compliance - as the utility had repeatedly delayed in the past. When asked the response for the difference in attitude of top management towards RCRA - where the utility strives to comply - and the program where the utility was 17 years behind in complying, utility officials explained that it was a matter of whether there were any serious enforcement and penalties. For RCRA, there is. For the other, there is no meaningful enforcement, no inspections and no fines or penalties for being out of compliance. The end result: noncompliance. So, too, with the USDOE until there is an inspection program per Section 2(b) of S. 596 and the ability of the EPA and states to levy fines and penalties.

***Ongoing Violations of RCRA are Extremely Serious,
Posing Imminent and Substantial Threats
To Public Safety and the Environment:
The Lack of Enforcement Mechanisms Destroys
Public Confidence in Claims that USDOE Will Comply
and Allows the Threats to Continue Unchecked***

We should not lose our perspective on how serious the threats to the environment and public safety are from USDOE failure to comply with RCRA. As we wrangle with USDOE over whether it is or is not committed to compliance, and over legal terms like 'sovereign immunity,' it is easy to lose track of the magnitude of the Department's violations and the threats they pose. It is all too easy, perhaps because there are so many outrageous examples, to forget that the debate over S. 596 has real consequences regarding illegal waste discharges happening at this very moment.

S. 596 would require federal facilities to "perform an assessment of the releases of hazardous substances from each solid waste management unit at each hazardous substance treatment, storage, or disposal facility owned or operated by the department...after November 19, 1980." Assessments would be provided to the EPA and states and include whether the facility is in compliance. *Section 2(a).*

Annual inspections of facilities would be conducted by EPA and include analysis of groundwater monitoring. *Sec. 2(b).*

These provisions are extremely important to bring about compliance at Hanford and other DOE facilities.

Currently, DOE is woefully out of compliance with RCRA groundwater monitoring requirements at Hanford.

It is this state of lack of compliance that allowed DOE for years to plead ignorant to whether High-Level Nuclear Wastes from Hanford's leaking Single Shell Tanks had reached the groundwater and whether they posed a threat to the Columbia River. DOE missed its milestones for installing RCRA groundwater monitoring wells at the Hanford SST's in 1990. Eleven were to be installed - only three were installed.

This violation should not be taken lightly. It occurred in large part because the DOE unilaterally diverted funds away from this activity (*See Table 6 attached*).

Further compounding DOE's seeming nonchalance about RCRA groundwater monitoring requirements at Hanford is the FY 1992 Congressional Budget Request which clearly fails to include sufficient funds to meet the installation of wells required by the Hanford Clean-Up Agreement in 1992 - much less install the wells missed in 1990 and 1991. Again, the lack of any serious enforcement threat in the form of penalties or fines breeds contempt for actual compliance with serious requirements.

USDOE and Westinghouse Hanford Co. - without fear of penalty - are apparently deliberately disposing of RCRA-regulated hazardous wastes directly into the soil at Hanford without even having obtained permits for the construction and operation of a new treatment, storage or disposal facility.

While USDOE continues to protest that it takes 30 to 60 years for liquids discharged to the soil in Hanford's 200 areas to reach the Columbia River - and while the Department backslides on its groundwater monitoring obligations under RCRA - independent studies show migration times much shorter and that illegal discharges accelerate the movement of wastes discharged in the past.

As late as November 1987, Hanford management undertook illegal discharges to crib 216-U-12 after submitting a closure permit representing to the State that the crib was inactive. *See 42 USC 6937(a)(4)*.

That crib, was illegally replaced by one in use today - without obtaining any permits from the State of Washington. *See 42 USC 6925 and 42 USC 6924.* Apparently, DOE and Westinghouse - free of the normal constraints imposed upon businesses subject to fines and penalties for such knowing violations of RCRA - continue to operate with no internal incentives to comply when faced with production or fiscal pressures.

Examples of serious on-going violations of RCRA at the Hanford Tank Farms abound. Failure to monitor groundwater seems minor compared to the storage of unknown chemicals in leaking tanks. The failure to notify the State and EPA of leaks, pursuant to RCRA violates numerous provisions of RCRA, including, *42 USC 6937*, the requirements for:

- a biannual inventory of federal agency hazardous waste sites with the location of each and dates of disposal and a "description of the hydrogeology of the site," *42 USC 6937(a)(1)*;
- the amount, nature and toxicity of hazardous wastes "in each site" *42 USC 6937 (a)(2)*;
- "Information on the known nature and extent of environmental contamination at each site, including a description of the monitoring data obtained," *42 USC 6937 (a)(3)*; Information regarding the current status of each site, "including information respecting whether or not hazardous waste is currently being treated, stored or disposed of at such site (and, if not, the date on which such activity ceased) and information respecting the nature of any other activity currently carried out at the site," *42 USC 6937 (a)(4)*; and
- listing sites at which hazardous wastes were disposed and for which environmental monitoring data is not available with an explanation of why not, *42 USC 6937 (a)(5)*.

These actions, including the repeated failures to notify the state and EPA of tank leaks and the presence of known explosive substances in the tanks, the disabling of alarms at the tanks, *etc.*, which violated RCRA, were not taken unknowingly by management. The choice to violate RCRA was undertaken in a continuing climate of the USDOE being

unaccountable to the public and regulators - because of USDOE's immunity from penalties and fines for RCRA violations. This can not be allowed to continue.

*So Long as DOE Holds Itself Out as Above The Law,
Immune from Penalties and Fines For Violating RCRA,
The Public Will Not Believe That The Department is
Attempting To Change Its Culture
To One of Compliance*

Please consider the following excerpt from USDOE-Richland's just-issued "Response to Comments on the Hanford Clean-Up Five Year Plan." The very first item under Common Concerns and Themes:

THE DOE'S 'CULTURE'

The DOE's claims of culture change can't be believed... Actions speak louder than words. The DOE opposes the Senate bills that would legally force it to comply with state and federal environmental regulations, and set up a dedicated trust fund for cleanup. That reveals the DOE's true position on accountability and cleanup.

RESPONSE: Many people said the DOE's opposition to the compliance and trust fund bills shows the DOE isn't serious about changing its culture. That isn't true. We are committed to getting into compliance with state and federal environmental regulations. We already comply with most; the Tri-Party Agreement, Hanford's 30 year cleanup plan, guides us toward compliance with the rest. We oppose the two bills because we believe the existing system works and gives more flexibility to respond to new issues. We agree with the goals of the bills, but not their methods. We know the states of Washington and Oregon disagree. Congress must resolve this disagreement.

In conclusion, we believe that the DOE's record of noncompliance, which threatens the health and environment on an ongoing basis, shows that the existing system does not work, contrary to DOE's claim! The existing system of "flexibility" by the DOE means that it is compliance with the law and protection of the environment that is always expected to be "flexible" and bend. This is reflected in DOE's Congressional Budget Request for FY 1992 - submitted to you with huge shortfalls for meeting the timelines and milestones of the Hanford Clean-Up Tri-Party Agreement. The DOE knowingly submitted a budget request that

required it to seek major multi-year delays - beyond those it has already unilaterally implemented - in the Hanford Clean-Up Tri-Party Agreement. Knowing that the regulators and other parties to the Agreement could not obtain any penalty against DOE for those delays simply emboldened DOE to unilaterally delay clean-up. You can provide the cure by passing S. 596 and restoring the balance.



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"Advancing our region's quality of life"

\$1.76 Billion Shortfall Between USDOE FY 1992 Budget Request and USDOE 5 Year Plan "Requirement Level" for Meeting Obligations of Clean-Up Agreements and 30 Year Clean-Up Goal:

The Case For A "Dedicated Account" For Meeting USDOE Environmental Restoration and Clean-Up Agreements / Consent Orders Obligations.

Table 1: DOE FY '92 Budget Request by Category.

Table 2: FY '92 Request Level for Hanford Compared to 5 Year Plan "Requirement Level".

Table 3: Detail FY '92 Hanford Environmental Restoration Funding Shortfall.

Table 4: Abuse of "Clean-Up Account" at Hanford.

Table 5: \$1.759 Billion Shortfall in FY '92 USDOE Clean-Up Budget.

Table 6: Diversions of Clean-Up Funds Led to Breaches in Hanford Clean-Up Agreement.

Table 7: How FY '92 Shortfalls Affect Real Clean-Up Activities at Hanford.

News Articles: N.Y. Times / Spokane Spokesman Review

Table 1

U.S. Department of Energy
Congressional Budget Request
FY 1992

(Dollars in Millions)

TOTAL DOE REQUEST	\$18,567.6
ATOMIC ENERGY DEFENSE ACTIVITIES	11,768.0
CORRECTIVE ACTIVITIES	92.5
ENVIRONMENTAL RESTORATION	1,074.4
WASTE MANAGEMENT	2,185.1

Definitions

CORRECTIVE ACTIVITIES -- "This program supports activities required to bring active and standby facilities at DOE sites into compliance with all applicable air, water, and solid waste regulatory requirements, negotiated agreements, and other regulatory requirements."
(DOE FY92 Budget, p.469)

ENVIRONMENTAL RESTORATION -- "The Facilities and Sites [Environmental Restoration] activity conducts remedial actions and decontamination and decommissioning (D&D) projects to reduce and remove the potential risks to the environment and to human health and safety resulting from past Department [of Energy] activities."
(DOE FY92 Budget, p.488)

WASTE MANAGEMENT -- "The goal of the Waste Management Program is to provide safe, environmentally acceptable treatment, storage, and disposal (T/S/D) of Department of Energy (DOE) radioactive, hazardous, mixed, and sanitary waste, while protecting the workers, public, and the environment."
(DOE FY92 Budget, p.523)

Table 2

FY92 DOE Budget Request for Hanford
Compared to
Five Year Plan (FYP) FY92 Funding Requirements
for Hanford

(Dollars in Thousands)

HANFORD FY92	Budget Request	Required by FYP	Funding Shortfall
CORRECTIVE ACTIVITIES	10,932	24,777	13,845
ENVIRONMENTAL RESTORATION	148,000	225,597	77,597
WASTE MANAGEMENT	752,030	1,047,740	295,778
TOTAL FUNDING SHORTFALL			\$387,220

Table 3

A Closer Look at Hanford
FY92 Environmental Restoration
Funding Shortfalls

(Dollars in Thousands)

Five Year Plan FY92 Requirements	
Hanford Environmental Restoration	
ASSESSMENT	\$175,820
CLEANUP	49,777

TOTAL	\$225,597
-------	-----------

DOE Environmental Restoration
Budget Request

\$148,000

Environmental Restoration
Funding Shortfall

\$77,597

Table 4

**DIRT IN THE CLEANUP BUDGET
AT THE
HANFORD RESERVATION**

(Dollars in Thousands)

\$177,000	Funding for standby Nuclear Materials Production Program facilities at Richland, including PUREX, Plutonium Finishing Plant, and K-Reactor storage basins.
\$42,500	"N-Reactor funding is contained in this request as pass-through funding since day-to-day management of that facility is the responsibility of the Defense Programs."
\$8,840	Landlord Safety Compliance -- Phase I This project provides the following: -2 new fire protection reservoirs, -new tanks and pumps for storage/distribution of fire protection water, -23 miles of new railroad track to complete the upgrade and rehabilitation of the Hanford railroad system, and -upgrade of electrical system in existing steam plant to comply with current codes.
\$4,419	300 Area Electrical Distribution Conversion and Safety Improvements -- Phase I.
\$1,100	300 Area Electrical Distribution Conversion and Safety Improvements -- Phase II. These two projects together will complete the conversion of the existing overhead power lines in the 300 Area to buried power cables.
-\$3,711	Hanford Waste Vitrification Plant (-15%) A 15% drop in funding for the Hanford Waste Vitrification Plant, as compared to FY91 funding.

\$1.759 BILLION FUNDING SHORTFALL IN FY1992 CLEANUP BUDGET FROM USDOE

DOE Environmental Restoration and Waste Management Account
Five-Year Plan Requirements vs. DOE Congressional Budget Request, Fiscal
Year 1992, for Atomic Energy Defense Activities Sites Only. (Dollars
in Millions)

Activity	DOE FY92 B u d g e t Request	Five-Year Plan FY92 Requirement	FY92 Funding Shortfall
Corrective Activities	92.5	159.0	66.5
Environmental Restoration	1,074.4	1,441.1	366.7
W a s t e Management	2,185.1	3,511.1	1,326.0
			\$ 1,759.2

The \$1.75 billion funding shortfall in DOE's FY92 Congressional Budget Request clearly demonstrates DOE's nearly complete lack of commitment to restoration of the environment and to environmentally responsible waste management operations.

Adding the FY92 funding shortfall to the \$646.5 million funding shortfall in DOE's FY91 Congressional Budget Request shows that DOE has asked Congress for \$2.4 Billion LESS than what is required to meet Five-Year Plan Environmental Restoration and Waste Management commitments.

This lack of commitment to funding Five-Year Plan environmental programs is particularly distressing, as it will increase both the amount of money and the time required to complete the cleanup of DOE's nuclear weapons production facilities. The Doe goal is sailing on a course directly away from Admiral Watkin's stated goal of a 30-year cleanup.

Sources:

- 1) "Environmental Restoration and Waste Management, Five Year Plan," DOE/S-0078P, June 1990, Attachments A, B, and C.
- 2) "US DOE Fiscal Year 1992 Congressional Budget Request," Vol. 1, DOE/CR-0001, February 1991.

COMPILED BY JAMES E. BEARD FOR HEART OF AMERICA NORTHWEST.

Clean-Up Agreement Milestones:		Proposed Timeline:		Funds Diverted?		Implemented	
		Delay:		Probable		W/out Notice	
1. Vitrification Plant		Start Construction July '91...July '93				YES	
[turn liquid High-Level N-Waste to Glass]		Finish Construction June '98...June 2000					
		Start Operations Dec. '99...Dec. 2001					
2. Pre-Treatment of Liquid High-Level N-Waste (prior to vitrifying)		Submit Permit App. Oct. '91...Sept. '92		YES		YES	
		Start Operation Oct. '93...Dec. '97					
3. Single Shell High-Level N-Waste Tank Liquid Removal ("Interim Stabilization")		Stabilized 9 Tanks: Sept. '91...4 tanks		YES		YES	
		Stabilized 18 Tanks: Sept. '92...13 tanks		Missed 1990 goal of 1 tank			
		Stabilized 27 Tanks: Sept. '93...24 tanks					
		Stabilized 36 Tanks: Sept. '94...32 tanks					
4. WRAP Plant Waste Receiving and Processing - analyzes stored wastes		Finish Construction Sept. '95...March '96		YES		YES	
		Startup...Sept. '96...March '97 (\$1million diverted)					
5. Single Shell N-Waste Tank Characterization (sample tank wastes)		4 Samples of 2 tanks: 12/31/90...9/30/91		YES		YES	
		16 Samples of 8 tanks: 9/30/91...777777		(Truck diverted)			
6. Grout-Dispose of Pre-Treatment Waste Stream in Concrete:		Fill 3 Vaults: Sept. '91...April '93		YES		777	
		Fill 6 Vaults: Sept. '92...April '94					
		Fill 10 Vaults: Sept. '93...April '95					
		Fill 14 Vaults: Sept. '94...April '96		YES		YES	
7. Environmental Restoration: Contaminated Soil/Groundwater Investigations		DOE Proposes Major Change in Nature and Pace of Investigations, Precluding Comparisons of Milestones - \$75million unfunded in '92				(FY '92 Budget reveals major unannounced delays)	
8. Groundwater Monitoring Wells (Required by environmental laws to monitor N-Waste tank leaks and other contamination)		Install 11: end 1990...Only 3 done		YES		YES	
		Proposed Catch-up in 1991					
		But 1992 Budget Request Reveals Inadequate Funding to Install 50 per year					



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HOW SECRETARY OF ENERGY WATKINS' BUDGET REQUEST FALLS SHORT OF HIS OWN 'FIVE YEAR PLAN' FOR HANFORD CLEAN-UP AND BREACHES HANFORD CLEAN-UP AGREEMENT REQUIREMENTS

Hanford Clean-up
Budget Category: FY 1992 \$ Requested - 'Requirements level' for FY '92 from Watkins' 'Five Year Plan'

Corrective Activity **\$ 13.977million** **\$ 24.777million**

Notes: This category includes bringing Hanford facilities, including wastes, into compliance with environmental laws. \$10.285million is the requirements level for groundwater monitoring required by RCRA near the leaking High-Level Nuclear Waste Tanks. It appears this critical requirement for meeting the Clean-Up agreement is in jeopardy.

Environmental Restoration **\$154.900million** **\$ 225.597million**

Notes: The category of "Environmental Restoration" is the only true "clean-up" category in the budget. This represents remedial investigations and remedial action; i.e., "clean-up"; of actual waste sites. Examples of activities which had been expected during FY 1992: Single Shell Tank (High-Level Waste) characterization; Funding for State Oversight of RCRA and CERCLA; Decontamination/Decomm. of 183-H Solar Evap.Basins; 327 Building Hot Cell Cleanout; Closures of cribs (liquid discharge pipes to soil); Characterization of soil contaminated sites;

Waste Management **\$811.991million** **\$1.048billion**

Notes: Watkins is cutting \$140 million from construction of the High-Level Nuclear Waste Vitrification Plant in this category.

While major cuts to Clean-Up Agreement activities are indicated by the shortfall, USDOE intends that \$200 million of these funds will be used to operate the Plutonium producing PUREX and PFP and UO3 plants in FY'92 - despite Congressional disapproval of such use of "clean-up" funds for FY'91.

TOTAL SHORTFALL: \$ 317.506MILLION

2nd Year REPORT CARD

Issued by
Military Production Network

TO: U.S. DEPARTMENT OF ENERGY
and Secretary James Watkins

SUBJECT	LAST YEAR'S GRADE	THIS YEAR'S GRADE	CITIZEN COMMENT
Public Relations Rhetoric	A	B-	The words ring hollow as the credibility gap grows larger
Openness and Accountability	D	F	Restricts public access to information and punishes whistle-blowers
Compliance with Environmental Laws	D+	D	Still needs lawsuits as a prod and continues to oppose state and EPA oversight
Waste Clean-Up	D-	D-	Breaking clean-up agreements--fixated on Yucca Mountain & WIPP non-solutions
Protecting Worker and Community Health	C-	C-	Blocks fully independent health studies
Stopping Unnecessary Weapons Production	D	D-	Keeps promoting new production reactors and Savannah River and Rocky Flats restart
Budget Priorities	F	F	Fails to fund DOE's own clean-up timetable and mislabels production funds as clean-up

Citizen Recommendation: PROBATION for continued failure to make meaningful progress. DOE still doesn't get it!

STATEMENT OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. Chairman and members of the Subcommittee, this statement is being presented by the National Conference of State Legislatures to urge approval of S. 596, the Federal Facilities Compliance Act of 1991. Our strong support for this legislation rests upon two prime concerns. First, we must place the highest priority on ending the hazards posed to our citizens from toxic waste. The Act provides a necessary mechanism in the range of tools enforcers need to induce obedience to the law. Second, as a matter of fairness, every violator must be subject to the sanctions necessary to insure compliance. The Act clarifies the Congressional intent that when the Federal Government fails to comply with lawful mandates, it will be treated no differently than States, localities and private businesses with respect to penalties.

Congress intended to waive Federal sovereign immunity when the Resource Conservation and Recovery Act became law, but recalcitrant Federal agencies are fighting an expensive battle to challenge the waiver of sovereign immunity. In four States, the Federal agencies have convinced the Federal courts that by subjecting the Federal Government to "all" substantive and procedural requirements, Congress somehow did not intend to subject the Federal Government to fines and penalties. Other Federal courts have upheld the right of the States to impose fines and penalties, but the dispute has encouraged the diversion of Federal resources from cleanup to litigation.

On the necessity for action in this area, the record is replete with examples of Federal agencies seeking to avoid compliance and thereby endangering the public through careless or worse conduct. For example, at the Department of Energy's Production Center in Fernald, Ohio, tons of radioactive particles contaminated the air and groundwater. The Ohio Attorney General stated that experience has shown that self-regulation by the Department of Energy has not protected the public, and that the threat of civil penalties is critical to compliance.

On the issue of fairness, it makes no sense for the Federal Government to exempt itself from the operation of the law. Efforts to clean the environment and prevent future hazards requires consistent, even-handed attack on the violators. On the one hand, State and local governments are subject to fines and penalties for violations of the law, while the Federal Government has the power to carve out an exemption. When the Federal Government creates such an exception for itself it creates a double standard for the law and cynicism about the value of the Federal Government as a protector of the public.

While defenders of the violating agencies contend that the assessment of fines and penalties would be a raid on the National treasury, we contend that tougher enforcement, with the motivator of fines and penalties will reduce costs to the Federal Government in the future. Compliance with regulations will prevent unnecessary expenditure of millions of dollars of clean-up costs. The savings and loan crisis is a warning that failure to enforce effectively early can create enormous costs in the future.

The question of fairness also comes into play when we remember that States ask for no greater power against the Federal treasury than the Federal Government has against State treasuries. In fact, the United States Environmental Protection Agency (EPA) seeks fines and penalties in nearly 90 percent of its civil suits against States and municipalities.

It is beyond irony that Federal agencies, in concert with the Department of Justice, propose that they are above the Federal law. The EPA is curtailed in its efforts to enforce compliance at Federal facilities because of a "unitary executive" theory that the Justice Department espouses to protect one agency from exercising judicial enforcement against another. Therefore, the duty to protect our people from harm falls to the States. Unfortunately, denying the waiver of Federal sovereign immunity emasculate the State power to enforce. In many instances, that leaves the offender in the position of self-regulation, which has proven to be dangerously ineffective. States serve a crucial role in bridging enforcement gap. It is the careful reasoned foundation of our federalism that power should be shared and balanced in order to protect our citizens from the deficiencies or excesses of other levels of government. It is wrong to stymie further the efforts of States in protecting their citizens by undercutting this delicate balance and by denying States the rightful tools to motivate compliance.

In our Federal system, States retain the inherent power and the duty to protect the health and safety of their citizens through the police powers. This duty was acknowledged when Congress passed the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), which delegated to States the primary for environmental enforcement. With these powers, States are to fulfill

national policy objectives with our own resources appropriated to attorneys general for enforcement, and at the same time, States are denied the power to act effectively.

Some interest has been expressed in curtailing State powers in other ways as well. Language will be included in this year's House version of S. 596, which would earmark State fines and penalties for environmental purposes. NCSL urges you to oppose this approach if it is offered. We question whether Congress would even have the authority under the Constitution to control State revenues so intrusively. We have discovered no precedent for such overreaching. A similar proposal to earmark State revenue under the Clean Air Act was rejected on federalism grounds.

We support the principle of providing sufficient financial support for enforcement of environmental clean-up. However, we strongly object to the method to be proposed in the House version, and which could also surface as an amendment in the Senate's. Earmarking has been debated at the State level; some States have adopted it for environmental programs. However, its value is not such that it should be mandated nationwide. By allowing national or State legislatures to claim that they have provided funds through earmarking, efforts to achieve adequate funds for clean-up through the appropriations process can lose their force.

Attempts by the Federal Government to earmark State revenues is not justifiable in other terms. It represents an indefensible attempt by the law breaker, (in this instance, the Federal agency) to control the use of fines and penalties paid to the law enforcer (in this case, the State). Further, arguments that the Federal legislature must earmark State collected fines and penalties to prevent their use for general fund revenues show both a lack of appreciation for the principles of shared power between the States and the National government and a failure to comprehend the fiscal processes within the States themselves. Attorneys general are not responsible for raising general fund revenue; legislatures are. Legislatures on the other hand do not execute the environmental laws. Proposing such a far-fetched conspiracy against the Federal treasury also overlooks the fact that the Federal agency has the power to challenge allegedly unfair assessment before a Federal judge in a Federal court. The expressions of fear about State action against the Federal Government also suggest a convenient ability to forget that the Federal Government has power to collect fines and penalties against States, and States do not have the power to earmark such Federal revenues.

The earmarking issue distracts attention from the central concern of safeguarding the powers of those who would protect our citizens from grave dangers to their health and safety. The Clean Air Act, the Safe Drinking Water Act and the Medical Waste Tracking Act of 1988 have all operated effectively without an earmarking provision. The nations' legislatures call on this subcommittee and Congress to pass S.59 as introduced, in order to eliminate the unfair double standard that undermines respect for law enforcement. Such an action will expedite the important business of maintaining a healthy environment for our citizens.

*ENVIRONMENTAL ACTION*ENVIRONMENTAL DEFENSE FUND*FRIENDS OF THE EARTH*
 *GREENPEACE*IZAACK WALTON LEAGUE*LEAGUE OF WOMEN VOTERS*
 *NATIONAL AUDUBON SOCIETY*NATIONAL COUNCIL OF CHURCHES*SIERRA CLUB*
 U.S. PUBLIC INTEREST RESEARCH GROUP

SWIFTLY ENACT S. 596 -- OPPOSE ALL WEAKENING AMENDMENTS

April 15, 1991

Dear Senator:

Thank you for your support for the Federal Facilities Compliance Act when it was unanimously reported by the Environment and Public Works Committee in 1990. We urge swift enactment the Federal Facilities Compliance Act of 1991, S. 596, and oppose all amendments to weaken the bill.

The events of the last few months prove that swift enactment of S. 596 is crucial to protect public health and the environment. In January, DOE unilaterally decided not to honor the RCRA components of the Hanford agreement it signed with Washington state and EPA Region X. Last fall, DOE began actively resisting EPA's regulatory authority at the Feeds Materials Production Center in Fernald, Ohio. DOE will not fully comply with RCRA until the states and EPA have complete enforcement authority provided by S. 596.

We also oppose any amendments to weaken S. 596 should any be offered. Civil penalty authority must not be restricted. Any restriction will continue the current inequity among federal agencies, industry and local governments - a double standard never intended by Congress. S. 596 clarifies that federal agencies must act in the same manner as private industry and local governments.

We ask you to swiftly report out S. 596, as offered by Senator George Mitchell, and to oppose any weakening amendments. Thank you,

Sincerely,

D. J. Gardiner
 David J. Gardiner
 Legislative Director
 Sierra Club

Melinda Taylor
 Melinda Taylor
 Deputy Counsel
 National Audubon Society

Joseph Schwartz

Joseph Schwartz
Legislative Counsel
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Rick Hind
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Toxics Campaign
Greenpeace

Carl Casebolt
Program Associate
National Council of Churches

Carl Casebolt

Karen Florini

Karen Florini
Senior Attorney
Environmental Defense Fund

S. 596

IN THE SENATE OF THE UNITED STATES

Mr. MITCHELL (for himself, Mr. LAUTENBERG, Mr. BAUCUS, Mr. BURDICK, Mr. REID, Mr. HARKIN, Mr. PELL, Mr. LEVIN, Mr. SARBANES, Mr. LIEBERMAN, Mr. SPECTER, Mr. DECONCINI, Mr. BRYAN, Mr. ADAMS, Mr. BUMPERS, Mr. COHEN, Ms. MIKULSKI, Mr. WIRTH, Mr. WELLSTONE, Mr. GRAHAM, Mr. AKAKA, Mr. METZENBAUM, Mr. KERRY, and Mr. SANFORD) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works.

A BILL

To provide that Federal facilities meet Federal and State environmental laws and requirements and to clarify that such facilities must comply with such environmental laws and requirements.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SHORT TITLE

4 SECTION 1. This Act may be cited as the "Federal
5 Facility Compliance Act of 1991".

1 FACILITY ENVIRONMENTAL ASSESSMENTS

2 SEC. 2. (a) Each department, agency, and instrumen-
3 tality of the United States shall perform an assessment
4 of the releases of hazardous substances (including hazard-
5 ous constituents thereof) from each solid waste manage-
6 ment unit at each hazardous substance treatment, storage,
7 or disposal facility owned or operated by the department,
8 agency, or instrumentality after November 19, 1980. Such
9 assessments shall be completed within twelve months after
10 the enactment of this section and shall indicate whether
11 such facility and department, agency, or instrumentality
12 is in compliance with applicable requirements of the Solid
13 Waste Disposal Act, the Comprehensive Emergency Re-
14 sponse, Compensation, and Liability Act, the Clean Air
15 Act, the Clean Water Act, the Safe Drinking Water Act,
16 and the Toxic Substances Control Act. Such assessments
17 shall be provided to the Environmental Protection Agency
18 and to the State in which the facility is located.

19 (b) FACILITY INSPECTIONS.—The Administrator of
20 the Environmental Protection Agency shall undertake a
21 thorough inspection annually of each facility owned or op-
22 erated by a department, agency, or instrumentality of the
23 United States that is subject to the Solid Waste Disposal
24 Act, the Comprehensive Emergency Response, Com-
25 pensation, and Liability Act, the Clean Air Act, the Clean

1 Water Act, the Safe Drinking Water Act, and the Toxic
2 Substances Control Act to enforce compliance with these
3 Acts. Each annual inspection shall include an analysis of
4 comprehensive groundwater monitoring. The records of
5 such inspections shall be available to the public in the
6 same manner as provided in section 3007(b) of the Solid
7 Waste Disposal Act. The department, agency, or instru-
8 mentality owning or operating each such facility shall re-
9 imburse the Environmental Protection Agency for the
10 costs of the inspection of the facility.

11 APPLICATION OF CERTAIN PROVISIONS TO FEDERAL
12 FACILITIES

13 Sec. 3. (a) IN GENERAL.—Section 6001 of the Solid
14 Waste Disposal Act (42 U.S.C. 6961) is amended—

15 (1) by inserting “(a) IN GENERAL.—” after
16 “6001.”;

17 (2) in the first sentence, by inserting “and
18 management” before “in the same manner”;

19 (3) by inserting after the first sentence the fol-
20 lowing: “The Federal, State, interstate, and local
21 substantive and procedural requirements referred to
22 in this subsection include, but are not limited to, all
23 administrative orders and all civil and administrative
24 penalties and fines.”; and

25 (4) by inserting after the second sentence the
26 following: “For purposes of enforcing any such sub-

4

1 stantive or procedural requirement (including, but
2 not limited to, any injunctive relief, administrative
3 order, or civil or administrative penalty or fine)
4 against any such department, agency, or instrumen-
5 tality, the United States hereby expressly waives any
6 immunity otherwise applicable to the United States.
7 No agent, employee, or officer of the United States
8 shall be personally liable for any civil penalty under
9 any Federal or State solid or hazardous waste law
10 with respect to any act or omission within the scope
11 of his official duties. An agent, employee, or officer
12 of the United States shall be subject to any criminal
13 sanction (including, but not limited to, any fine or
14 imprisonment) under any Federal or State solid or
15 hazardous waste law, but no department, agency, or
16 instrumentality of the executive, legislative, or judi-
17 cial branch of the Federal Government shall be sub-
18 ject to any such sanction."

19 Federal agencies are authorized, at the discretion of the
20 Secretary of the head of the Federal department or agency
21 concerned, to:

22 (1) in State criminal proceedings, represent or
23 expend funds to represent an employee in a case in
24 which he or she is sued, subpoenaed or charged in
25 his or her individual capacity, when the actions for

1 which representation is requested reasonably appear
2 to have been performed within the scope of the em-
3 ployee's employment and providing representation
4 would otherwise be in the interest of the United
5 States;

6 (2) in Federal criminal proceedings, reimburse
7 an employee for reasonable defense costs, if no in-
8 dictment is brought, for actions performed within
9 the scope of the employee's employment.

10 (b) ADMINISTRATIVE ENFORCEMENT ACTIONS.—

11 Such section is further amended by adding at the end the
12 following new subsection—

13 “(b) ADMINISTRATIVE ENFORCEMENT ACTIONS.—

14 (1) The Administrator may commence an administrative
15 enforcement action against any department, agency, or in-
16 strumentality of the executive, legislative, or judicial
17 branch of the Federal Government pursuant to the en-
18 forcement authorities contained in this act. The Adminis-
19 trator shall initiate an administrative enforcement action
20 against such a department, agency, or instrumentality in
21 the same manner and under the same circumstances as
22 an action would be initiated against another person. Any
23 voluntary resolution or settlement of such an action shall
24 be set forth in a consent order.

6

1 “(2) No administrative order issued to such a depart-
2 ment, agency, or instrumentality shall become final until
3 such department, agency, or instrumentality has had the
4 opportunity to confer with the Administrator.”.

5

DEFINITION

6 SEC. 4. (a) PERSON.—Section 1004(15) is amended
7 by adding the following before the period: “and shall in-
8 clude each department, agency, and instrumentality of the
9 United States.”.

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